NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERICAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 1313

TO AMEND THE NATIONAL COOPERATIVE RESEARCH ACT OF 1984 WITH RESPECT TO JOINT VENTURES ENTERED INTO FOR THE PURPOSE OF PRODUCING A PRODUCT, PROCESS, OR SERVICE

MARCH 18, 1993

Serial No. 4

Printed for the use of the Committee on the Judiciary

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NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993

THURSDAY, MARCH 18, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Robert C. Scott, David Mann, Melvin L. Watt, Hamilton Fish, Jr., Bob Inglis, Bob Goodlatte, and Carlos J. Moorhead.

Subcommittee staff present: Cynthia W. Meadow, counsel; George P. Slover, assistant counsel; Perry Apelbaum, assistant counsel; Carrie Bedwell, assistant counsel; Catherine S. Cash, research assistant; Deloris L. Cole, office manager; Suzanne Young, secretary; full committee staff present: Jonathan R. Yarowsky, general counsel; Daniel M. Freeman, counsel; Alan F. Coffey, minority chief counsel; and Charles E. Kern II, minority counsel.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The subcommittee will come to order. The hearing today is on the bill, H.R. 1313, the National Cooperative Production Amendments of 1993, which Congressmen Fish, Edwards, Boucher, Moorhead, and I introduced March 11. A companion bill, S. 574, was introduced in the Senate the same day by Senators Biden, Leahy, and Thurmond.

After two Congresses of contemplating possible legislation in this area, I think it is high time we act on this bill if we are going to do our part in bolstering American competitiveness. Given our prior work in this area, I believe H.R. 1313 is a balanced and responsible policy response to the erroneous—yet genuinely held—perception by some that the antitrust laws somehow contribute to this country's poor competitive position in the changing world marketplace.

That assumption is not correct, but let us be candid: Misperceptions about antitrust can affect commercial behavior and retard America's reemergence as a world class player in a variety of high tech and manufacturing sectors.

H.R. 1313 amends the National Cooperative Research Act of 1984, which was passed to encourage similar joint ventures for R&D. Over 300 joint ventures have been reported to the antitrust agencies under that law, which by all accounts seem to be working

well. Now H.R. 1313 extends the R&D Act's coverage and protections to production joint ventures. The bill thus codifies the applicable legal standard and enforcement policy that has been applied to these types of collaborative ventures for the past three decades.

Perhaps most important, H.R. 1313 stands for the proposition that there is no inherent contradiction between our competitive statutes and the ability of U.S. firms to take those steps necessary to regain technological leadership. While passing this legislation will not by itself revitalize America's competitive standing in high technology and manufacturing, it is a significant step that we can take right now.

In addition to the bipartisan congressional support, President Bill Clinton has already endorsed the legislation as "just the kind of forward-thinking initiative we need to drive our economy toward a decade of creative change." This bill does just that without dampening the antitrust laws' ability to prevent improper collusion.

I look forward to hearing the views of our distinguished panel of witnesses. Gentlemen, relax there and I will introduce you after we hear statements from other members.

[The bill, H.R. 1313, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 1313

To amend the National Cooperative Research Act of 1984 with respect to joint ventures entered into for the purpose of producing a product, process, or service.

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1993

Mr. BROOKS (for himself, Mr. FISH, Mr. EDWARDS of California, and Mr. BOUCHER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the National Cooperative Research Act of 1984 with respect to joint ventures entered into for the purpose of producing a product, process, or service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Cooperative Production Amendments of 1993".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) technological innovation and its profitable commercialization are critical components of the

ability of the United States to raise the living standards of Americans and to compete in world markets;

(2) cooperative arrangements among nonaffiliated businesses in the private sector are often essential for successful technological innovation; and

(3) the antitrust laws may have been mistakenly perceived to inhibit procompetitive cooperative innovation arrangements, and so clarification serves a useful purpose in helping to promote such arrangements.

(b) PURPOSE.—It is the purpose of this Act to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by clarifying the applicability of the rule of reason standard and establishing a procedure under which businesses may notify the Department of Justice and Federal Trade Commission of their cooperative ventures and thereby qualify for a single-damage limitation on civil antitrust liability.

SEC. 3. AMENDMENTS.

(a) SHORT TITLE.—Section 1 of the National Cooperative Research Act of 1984 (15 U.S.C. 4301 note) is amended by striking "National Cooperative Research Act of 1984" and inserting "National Cooperative Research and Production Act of 1993".

(b) DEFINITION.—Section 2(a)(6) of the National Cooperative Research Act of 1984 (15 U.S.C. 4301(a)(6)) is amended—

(1) in the matter preceding subparagraph (A) by striking "research and development";

(2) in subparagraph (D) by inserting "or production" after "research";

(3) in subparagraph (E) by striking "and (D)" and inserting "(D), (E), and (F)";

(4) by redesignating subparagraphs (D) and (E) as subparagraphs (F) and (G), respectively;

(5) by inserting after subparagraph (C) the following:

"(D) the production of a product, process, or service,

"(E) the testing in connection with the production of a product, process, or service by such venture,"; and

(6) by striking "research" the last place it appears and inserting "such venture".

(c) EXCLUSIONS.—Section 2(b) of the National Cooperative Research Act of 1984 (15 U.S.C. 4301(b)) is amended—

(1) in the matter preceding paragraph (1) by striking "research and development";

(2) in paragraph (1) by striking "that is not reasonably required to conduct the research and development that is" and inserting "if such information is not reasonably required to carry out";

(3) by amending paragraph (2) to read as follows:

"(2) entering into any agreement or engaging in any other conduct restricting, requiring. or otherwise involving the marketing, distribution, or provision by any person who is a party to such venture of any product, process, or service, other than—

"(A) the distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such venture,

"(B) the marketing of proprietary information, such as patents and trade secrets, developed through such venture formed under a written agreement entered into before the date of the enactment of the National Cooperative Production Amendments of 1993, or

"(C) the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture formed under a written agreement entered

into on or after the date of the enactment of the National Cooperative Production Amendments of 1993,";

(4) in paragraph (3)—

(A) in subparagraph (A) by striking "or developments not developed through" and inserting ", developments, products, processes, or services not developed through, or produced by,";

(B) in subparagraph (B) by striking "such party" and inserting "any person who is a party to such venture"; and

(C) by striking the period at the end and inserting a comma, and

(5) by adding at the end the following:

"(4) entering into any agreement or engaging in any other conduct allocating a market with a competitor,

"(5) exchanging information among competitors relating to production (other than production by such venture) of a product, process, or service if such information is not reasonably required to carry out the purpose of such venture,

"(6) entering into any agreement or engaging in any other conduct restricting, requiring, or other-

wise involving the production (other than the production by such venture) of a product, process, or service,

"(7) using existing facilities in connection with the production of a product, process, or service by such venture unless such use is for the production of a new product or technology, and

"(8) except as provided in paragraphs (2), (3), and (6), entering into any agreement or engaging in any other conduct to restrict or require participation by any person who is a party to such venture, in any unilateral or joint activity that is not reasonably required to carry out the purpose of such venture.".

(d) RULE OF REASON STANDARD.—Section 3 of the National Cooperative Research Act of 1984 (15 U.S.C. 4302) is amended—

(1) by striking "research and development" the first place it appears;

(2) by striking "and development" the last place it appears and inserting ", development, product, process, and service"; and

(3) by adding at the end the following:

"For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to

the extent that it may be appropriate in the circumstances.".

(e) TECHNICAL AND CONFORMING AMENDMENTS.—The National Cooperative Research Act of 1984 (15 U.S.C. 4301 et seq.) is amended—

(1) in section 4—

(A) in subsections (a)(1), (b)(1), (c)(1), and (e) by striking "research and development" each place it appears; and

(B) in subsection (b) by inserting "of this section" after "subsection (d)"; and

(2) in section 5(a) in the matter preceding paragraph (1) by striking "research and development".

(f) DISCLOSURE.—Section 6 of the National Cooperative Research Act of 1984 (15 U.S.C. 4305) is amended—

(1) in the heading by striking "RESEARCH AND DEVELOPMENT";

(2) in subsection (a)—

(A) in paragraph (1) by striking "and" at the end,

(B) in paragraph (2) by striking the period at the end and inserting ", and", and

(C) by inserting the following after paragraph (2):

"(3) if a purpose of such venture is the production of a product, process, or service, as referred to in section 2(a)(6)(D), the identity and nationality of any person who is a party to such venture, or who controls any party to such venture whether separately or with one or more other persons acting as a group for the purpose of controlling such party."; and

(3) in subsections (a), (d)(2), and (e) by striking "research and development" each place it appears.

(g) LIMITATION.—The National Cooperative Research Act of 1984 (15 U.S.C. 4301 et seq.) is amended by adding at the end the following:

"APPLICATION OF SECTION 4 PROTECTIONS TO PRODUCTION OF PRODUCTS, PROCESSES, AND SERVICES

"SEC. 7. Notwithstanding sections 4 and 6, the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service, as referred to in section 2(a)(6)(D), unless—

"(1) the principal facilities for such production are located in the United States or its territories, and

"(2) each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production.".

SEC. 4. REPORTS ON JOINT VENTURES AND UNITED STATES COMPETITIVENESS.

(a) PURPOSE.—The purpose of the reports required by this section is to inform Congress and the American people of the effect of the National Cooperative Research and Production Act of 1993 on the competitiveness of the United States in key technological areas of research, development, and production.

(b) ANNUAL REPORT BY THE ATTORNEY GENERAL.—In the 30-day period beginning at each 1-year interval after the date of the enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate—

(1) a list of joint ventures for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 12-month period for which such report is made, includ-

ing the purpose of each joint venture and the identity and nationality of each party to such joint venture as described in such section; and

(2) a list of cases and proceedings, if any, brought during such period under the antitrust laws by the Department of Justice, and by the Federal Trade Commission, with respect to joint ventures for which notice was filed under such section at any time.

(c) TRIENNIAL REPORT BY THE ATTORNEY GENERAL.—In the 30-day period beginning at each 3-year interval after the date of the enactment of this Act, the Attorney General, after consultation with such other agencies as may be appropriate, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate—

(1) a description of the technological areas of research, development, and production most commonly pursued by joint ventures for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 3-year period for which such report is made, and an analysis of the trends in the competitiveness of United States industry in such areas; and

(2) an update of the report submitted by the Attorney General under subsection (d) to reflect changes in foreign law's antitrust treatment of joint ventures.

(d) REVIEW OF ANTITRUST TREATMENT UNDER FOREIGN LAWS.—Not later than 1 year after the date of enactment of this Act, the Attorney General, after consultation with such other agencies as may be appropriate, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the antitrust treatment of United States businesses that are parties to joint ventures under the law of each foreign nation whose domestic businesses filed notice under section 6(a) of the National Cooperative Research and Production Act of 1993 at any time.

○

Mr. BROOKS. Mr. Fish, the gentleman from New York.

Mr. FISH. Thank you, Mr. Chairman.

It is my hope and expectation that with this hearing, we are in sight of the end of a long legislative road.

Last week, I was pleased to join as a cosponsor of the "National Cooperative Production Amendments of 1993," (H.R. 1313). This legislation aims at an important objective—the further enhancement of America's competitive strength in the global market. By spreading the risks, production joint ventures will lower the burden of manufacturing costs for each participant. Futhermore, important efficiencies can be achieved by pooling the human and capital contributions that competing companies can make to both the engineering and production of a product, process, or service.

H.R. 1313 amends the National Cooperative Research Act of 1984 to extend to joint production the protections already provided therein to research and development joint ventures. These protections relate to the application of the rule of reason, attorneys' fees, and recovery on an antitrust claim. The conduct of any person in making or performing a production joint venture contract will not be deemed illegal per se, but will be judged under the rule of reason. This requires initial consideration of the procompetitive benefits that the venture might create and the determination of whether the venture will on balance harm competition in the relevant market. In addition, litigation costs, including reasonable attorneys' fees, would be awarded to the substantially prevailing party. Finally, parties properly notifying the Antitrust Division and the FTC of the "nature and objectives" of the joint venture and the names and nationalities of the participants would be liable for actual, rather than treble damages for antitrust violations arising from the joint activities disclosed, plus interest and attorneys' fees.

Mr. Chairman, as you know, I was involved in 1984 in the legislative formulation of the National Cooperative Research Act. That research and development statute has proved to be strikingly successful. By removing the disincentives in our antitrust laws to the formation of research and development joint ventures, it has enabled hundreds of companies to more successfully confront world competition.

This is what we hope will happen here again and so I am pleased to note that the bill before us represents a significant improvement over those measures previously introduced in this committee. It avoids the problem of excessive protectionism by codifying important incentives for American companies to cooperate in production joint ventures. New jobs will be created both in the high tech companies and in our traditional basic industries.

Now that we have reached bipartisan agreement with the Senate on the general form that this legislation should take, I look forward to its enactment into law in short order and I think we will be making a significant achievement when we do enact this legislation.

Mr. BROOKS. Thank you very much, Mr. Fish.

[The prepared statement of Mr. Fish follows:]

OPENING STATEMENT BY THE

HONORABLE HAMILTON FISH, JR.

ECONOMIC AND COMMERCIAL LAW SUBCOMMITTEE HEARING

ON "THE NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993"

(H.R. 1313)

MARCH 18, 1993

Thank you, Mr. Chairman. It is my hope and expectation that with this hearing we are within sight of the end of a long legislative road.

Last week, I was pleased to join as a co-sponsor of the "National Cooperative Production Amendments of 1993" (H.R. 1313). This legislation aims at an important objective -- the further enhancement of America's competitive strength in the global market. By spreading the risks, production joint ventures will lower the burden of manufacturing costs for each participant. Furthermore, important efficiencies can be achieved by pooling the human and capital contributions that competing companies can make to both the engineering and production of a product, process or service.

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In 1984, I was involved in the legislative formulation of the National Cooperative Research Act. That research and

development statute has proved to be strikingly successful. By removing the disincentives in our antitrust laws to the formation of research and development joint ventures, it has enabled hundreds of companies to more successfully confront world competition. Global competitive pressures soon made it clear, however, that the 1984 Act did not go far enough.

Commencing in 1989, I have introduced legislation in each succeeding Congress which proposed to build on the success of the 1984 Act by extending the scope of permissible joint activity to include manufacturing and production. My bill has never contained restrictions based upon the nationality of potential participants, nor location requirement. Nevertheless, the Judiciary Committee has twice reported joint production legislation containing such restrictions.

I am pleased to note that the bill before us this morning represents a significant improvement over those measures previously approved in this Committee. It avoids the problem of excessive protectionism, while codifying important incentives for American companies to cooperate in production joint ventures. New jobs will be created both in "high tech" companies and in our

traditional basic industries.

Now that we have reached bipartisan agreement with the Senate on the general form that this legislation should take, I anticipate that its enactment into law should be swiftly accomplished. While Committee consideration through the hearing process and markup may suggest some modifications, the outline is clear.

The enactment of joint production legislation would be a significant achievement. Coming as it does so early in the new Congress, it reflects not only today's economic realities but also a determination, on both sides of the aisle, to take effective steps to meet that challenge.

I join you, Mr. Chairman, in welcoming our witnesses this morning.

Mr. FISH. Excuse me, Mr. Chairman. I have been asked by our colleague, Carlos Moorhead, if his statement can be placed in the record at this point.

Mr. BROOKS. Without objection, so ordered.

[The prepared statement of Mr. Moorhead follows:]

STATEMENT OF HONORABLE CARLOS J. MOORHEAD

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW

"NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993"

H.R. 1313

MARCH 18, 1993

MR. CHAIRMAN, I HAVE LONG ADVOCATED THE ENACTMENT OF LEGISLATION THAT WOULD AMEND THE FEDERAL ANTITRUST LAWS SO AS TO ENCOURAGE PRODUCTION JOINT VENTURES. THE IDEA IS TO CREATE LEGAL INCENTIVES SO THAT COMPETING COMPANIES CAN GET TOGETHER AND COOPERATE ON A LIMITED BASIS IN PRODUCTION AND MANUFACTURING. THE RESULT WOULD BE THE MORE EFFICIENT USE OF CAPITAL, THE DEVELOPMENT OF NEW PRODUCTS FOR THE AMERICAN CONSUMER, AND THE CREATION OF NEW JOBS FOR AMERICAN WORKERS.

As a Member of this Committee and this Subcommittee, I was involved in the effort that led to the enactment of the National Cooperative Research Act of 1984 ("NCRA"). 15 U.S.C. §§ 4301-4305; Pub.L. 98-462. The NCRA reflected a congressional consensus in favor of encouraging and protecting American technological "know-how". The bill we consider today -- H.R. 1313 -- would amend that same statute, so that the benefits and protections now accorded joint research and development ventures would be extended to joint production ventures.

Specifically, H.R. 1313 would provide incentives for joint production activities by requiring the courts to take into account competition from abroad as well as at home. The courts would look at the pro-competitive effects of these ventures, when they evaluate and analyze possible antitrust violations.

FURTHER, THE PROPOSED LEGISLATION WOULD ALSO REDUCE ANTITRUST LIABILITY (FROM TREBLE DAMAGES DOWN TO SINGLE DAMAGES) FOR COMPANIES PARTICIPATING IN JOINT PRODUCTION VENTURES. DAMAGE REDUCTION IS A KEY ELEMENT IN CREATING THE NECESSARY INCENTIVES FOR COOPERATION.

WHEN THE COSTS OF PRODUCTION ARE SHARED, THE INVESTMENT IN NEW TECHNOLOGY BECOMES MUCH LESS OF A RISKY BUSINESS. THE ECONOMIC REALITIES OF HIGH TECHNOLOGY MANUFACTURING OFTEN INVOLVE PRODUCTS WITH EXTREMELY SHORT LIFE CYCLES AND DICTATE EXPANDED USE OF THE JOINT VENTURE MECHANISM. AMERICAN BUSINESSES, HOWEVER, SEEK GREATER LEGAL CERTAINTY AGAINST POSSIBLE ANTITRUST SUITS.

I AM PLEASED THAT THE BILL BEFORE US THIS YEAR DOES NOT CONTAIN THE PREVIOUS PROHIBITIONS ON FOREIGN PARTICIPATION. THAT FUNDAMENTAL IMPROVEMENT

MEANS THAT THIS IMPORTANT LEGISLATION WILL NOW LIKELY BECOME LAW. I CONGRATULATE THE CHAIRMAN ON THIS INITIATIVE AND LOOK FORWARD TO WORKING WITH HIM TOWARDS ENACTMENT.

Mr. BROOKS. Mr. Bobby Scott, the gentleman from Virginia.

Mr. SCOTT. Mr. Chairman, thank you.

I serve as a member of both the Science, Space, and Technology Committee and the Education and Labor Committee, and we have been working on both of those committees to try to make America more competitive.

This bill goes a long way in realizing that goal. I am particularly interested in the provision that provides for jobs in this country and look forward to the testimony and look forward to supporting the bill.

Mr. BROOKS. Thank you very much, Mr. Scott.

We will proceed this morning. I am asking our witnesses to appear as a panel to speak on behalf of H.R. 1313, the National Cooperative Production Amendments of 1993.

To save time, I would ask each witness to summarize his statement in no more than 5 minutes. After the witnesses have completed the statements, the subcommittee will address questions to all members of the panel. All prepared statements will be put in the record and attachments will be made part of the hearing record, so we have a record in which we can base a definitive defense and support of this legislation.

Without objection, the hearing record will remain open to receive written testimony from persons who have requested their statements be made part of the printed record.

[See appendix.]

Mr. BROOKS. Our first witness will be James F. Rill, former Assistant Attorney General for the Antitrust Division at the Department of Justice, a very distinguished lawyer of great competence. Mr. Rill has returned to private practice now with the Collier, Shannon, Rill & Scott law firm here in Washington.

It is good to see you again, Jim.

STATEMENT OF JAMES F. RILL, COLLIER, SHANNON, RILL & SCOTT, AND FORMER ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. RILL. Mr. Chairman, it is a great pleasure to be here and testify in support of this legislation. I particularly want to commend you and the ranking minority member, Mr. Fish, for your sponsorship of what I think is very desirable legislation and the long-time efforts of both of you to clarify the antitrust laws in this area.

I am delighted to hear that there has been an agreement with the Senate in this legislation and that the administration appears prepared to support it.

It is appropriate that a bill confirm that legitimate production joint ventures will be subject to the rule of reason treatment under the antitrust laws. It is appropriate that damage liabilities be limited to single rather than treble damages for legitimate joint ventures that notify the Department of Justice and the FTC of their existence.

In today's economy, in today's world, we have been told this by a number of business organizations, a number of firms, it is imperative that fast-paced commercial innovation respond quickly with state-of-the-art production facilities to take full advantage of tech-

nological innovation, which is paramount in importance to the position of the United States in world competition.

The cost and risk of that type of activity is often too much for individual firms and joint ventures to provide an effective means of meeting the challenge.

Concern has been expressed by business organization and academics that an overly restricted application of antitrust laws will discourage the formation and operation of growth competitive joint ventures. The fact, as you have pointed out, Mr. Chairman, is that, other than in the area of hardcore violations, the antitrust enforcement agencies typically treat legitimate production joint ventures under the rule of reason.

From my experience, both in and out of government, that certainly is the routine way, the way at which the Justice Department routinely treats such ventures.

At the same time, the Department does not hesitate to challenge joint ventures that are likely to harm consumers, but it avoids deterring or otherwise interfering with procompetitive joint ventures. Nevertheless, the widely expressed fear of enforcement actions being brought by the Government or private parties can be a powerful deterrent to procompetitive joint conduct especially where uncertainty exists regarding which antitrust standard that is will be applied and the threat of treble damage exposure overhangs the activity.

Therefore, legislative action for the rule-of-reason antitrust approach with respect to joint ventures, coupled with the increase in damage exposure, will appropriately improve the legal climate under which joint ventures operate and serve the purposes of the legislation to enhance the competitiveness of the United States in the world today.

The fact is that consumers would be protected under the existing legislation. Illegal joint ventures would still be subject to attack by the Department of Justice, by the FTC, by private litigants. Treble damages would remain available where the participants in the joint venture elected not to disclose their activity to the Department and to the FTC. Most importantly, sham joint ventures and price-fixing cartels that masquerade under the title of joint ventures would be subject to criminal prosecution and per se liability in private actions as well as treble damages.

The bill is good in this respect. Under H.R. 1313, sponsored by you, Mr. Chairman, by Congressman Fish, and others, the legislation will apply only where the principal production facilities of the venture are located in the United States and either participant is either a U.S. person or subject to foreign laws which provide for nondiscrimination under their antitrust laws between the U.S. participants in joint ventures and home country participants in joint ventures.

This approach, in my opinion, represents a significant improvement over prior proposals. Concern with the lack of clear relationship to antitrust principles and political inconsistency with trade policy raise some serious question about earlier approaches. The version approved by the Senate last year alleviated some of those concerns.

H.R. 1313 represents a significant step in the same direction. If enacted, it would clarify the antitrust laws for the great majority of joint production ventures with which those laws are concerned.

Under the bill, the national limitation, for example, does not apply to R&D joint ventures. The bill does not limit rule of reason treatment in any respect. The clause requiring national treatment as a prerequisite for the detrebling benefits that national treatment under foreign antitrust laws is reasonable and should not pose a significant problem since the antitrust laws of most industrial States very closely parallel those of the United States.

Finally, the requirement regarding the location of the joint venture facilities in this legislation, unlike the benefits resulting from the Senate-passed bill last year, is related to the stated purposes of the legislation and constitutes, I think, an appropriate judgment which Congress might make to see to it that the benefits of the bill set forth in the findings are actually realized.

Mr. Chairman, I think the bill represents a very solid step in the direction and clarification to the antitrust laws consistent with the desire and indeed necessary steps to enhance productivity in America. I think it should pass and I congratulate you and Mr. Fish for sponsoring it.

Thank you very much.

Mr. BROOKS. Thank you very much, Mr. Rill.

[The prepared statement of Mr. Rill follows:]

STATEMENT OF JAMES F. RILL BEFORE THE HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW, CONCERNING H.R. 1313, THE NATIONAL COOPERATIVE PRODUCTION AMENDMENTS OF 1993

MARCH 18, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss The National Cooperative Production Amendments of 1993, a proposal designed to eliminate uncertainty regarding the impact of the United States antitrust laws on joint production ventures. If enacted, this proposal would extend the coverage of the National Cooperative Research Act of 1984 (hereinafter "NCRA") to such ventures.

NCRA coverage of joint ventures (1) ensures that ventures are subject to rule of reason, rather than per se, antitrust analysis; and (2) provides a procedure whereby venturers may limit their antitrust damage exposure to actual -- not treble -- damages through public notification. At the same time, the NCRA does not diminish the ability of the antitrust laws to safeguard against ventures that threaten to harm consumers.

Potential Benefits of Procompetitive Joint Production Ventures

Recent decades have seen astonishingly varied and swift technological advances in dozens of industries. In light of today's increased pace of commercial innovation, firms must

respond quickly with state-of-the-art production facilities if the economy is to benefit fully from their technological advances. In addition, in many industries, the cost of commercializing new technologies is far too high for individual firms to bear efficiently. Moreover, the rapid pace of product innovation often imposes brief product life cycles, which increase firms' risk of investing in short-lived, i.e., soon to be obsolete, production facilities.

Joint production ventures often provide firms with an effective means of meeting these and other challenges. Such ventures can yield substantial procompetitive economic benefits, including the ability to:

- share the risks of marketing new technologies;
- share the costs of responding quickly and effectively to technological advances;
- realize economies of scale, where an efficient output for a production facility would be beyond the needs of any one firm;
- obtain economies of scope, where a joint facility may produce more efficiently a variety of products to meet the needs of different firms;
- use synergies that may arise from complementary skills or assets of the parties;
- achieve efficiencies in the purchase of supplies and transportation; and
- reduce transaction costs.

Antitrust Uncertainty as a Possible Deterrent to Procompetitive Joint Production Ventures

The antitrust laws proscribe only those concerted activities that unreasonably restrain trade. Over the years, some activities, including price-fixing and bid rigging, have been demonstrated virtually always to result in an unreasonable restraint of trade. As a result, these activities are properly considered per se violations for which no alleged procompetitive justifications may be offered. Other activities, however, are capable of promoting, rather than restraining competition; therefore, they are analyzed under the "rule of reason," which requires consideration of actual competitive effects and weighing of the potential procompetitive benefits of any challenged activity.

Legitimate joint production ventures should be analyzed under the rule of reason. From my experience both in and out of government, it is clear that the Department of Justice does so routinely. Instead of presumptively condemning joint production ventures, the Department determines whether participants in the venture in question would likely be able to exercise market power. The Department does not hesitate to challenge joint production ventures that are likely to harm consumers. At the same time, however, it seeks to avoid deterring or otherwise interfering with procompetitive joint ventures.

Nevertheless, fear of actions brought by the government, or of private actions for treble damages, can be a powerful deterrent to procompetitive conduct where uncertainty exists regarding the applicable antitrust standards. This concern emanates not only from academic circles but from the business community as well. Support for clarification of the antitrust laws in their application to legitimate production joint ventures was communicated

to me by a number of business firms and organizations, as well as by the legal profession. Thus, legislative enactment of the rule of reason antitrust approach to joint production ventures, coupled with reduced damage exposure (which can only be obtained through legislation), would improve the legal climate for procompetitive joint production ventures.

NCRA Extension is the Best Option

Of the various approaches that have been suggested in this area, a straightforward extension of the NCRA to joint production ventures is the best option. Under an extended NCRA, courts would be required to analyze legitimate joint production ventures under the rule of reason rather than the more narrowly focused per se rule, guaranteeing that (1) the ventures' likely effects on competition will be assessed in properly defined relevant markets; and (2) the procompetitive benefits of proposed ventures will be given appropriate consideration. Venturers who wish to limit their antitrust exposure would be required to disclose to the Department of Justice and the FTC the nature and objectives of their ventures. Each disclosed venture would then become known to the public through the NCRA's public notice procedure.

Consumers would remain well-protected from anticompetitive ventures because the proposed amendments do not purport to provide venturers with immunity from the antitrust laws; if they did, enactment would be undesirable because, of course, some joint production ventures are not procompetitive. Under the proposed amendments, both public and private enforcers would retain (1) their ability to seek injunctive relief against anticompetitive joint ventures; and (2) the right to collect damages actually inflicted by a joint venture that has

been shown to have had anticompetitive effects. Treble damages would also remain available where participants in the joint venture in question elected not to disclose their activities to the antitrust enforcement agencies. Most importantly, sham ventures that are actually cartels in disguise would receive no protection from the extended NCRA.

NCRA coverage could also provide significant enforcement benefits. Notice to the enforcement agencies would in many cases give them valuable early information about ventures that are not subject to pre-merger reporting requirements of the Hart-Scott-Rodino Act. Private parties, including state antitrust enforcement authorities, would also receive early notice of proposed joint ventures and the opportunity to seek antitrust relief before any competitive harm can occur.

An additional benefit of the NCRA extension approach is that it involves virtually no government regulation in the structuring and control of the venture. Rather, straightforward, non-intrusive antitrust enforcement tools and techniques would remain in place. Since 1984, the NCRA has been highly successful in the context of joint research and development ventures. I believe that its extension to joint production ventures would have similar results.

The Treatment of the "Domestic Content" Issue in H.R. 1313 is a Significant Improvement Over Previous Proposals

If H.R. 1313 becomes law, Section 7 of the amended NCRA will provide that The National Cooperative Production Amendments of 1993 will apply only where (1) the principal production facilities of the venture in question are located in the United States;

and (2) each participant in the venture is either a "United States person" or a "foreign person" from a country that "accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production."

Several variations on this aspect of the proposed NCRA amendments have been proposed during the past several years; the differences between the variations have given rise to significant disagreements and concerns. A review of the history of the proposed amendments reveals that H.R. 1313's version of Section 7 is markedly less restrictive than most prior proposals on the ability of foreign firms to participate in joint ventures eligible for the detrebling provision.

H.R. 1604, which was introduced in the last Congress, provided that the NCRA amendments would be applicable only to entities with no more than 30% foreign ownership whose production facilities are located in the United States. The version of S. 479 reported by the Senate Judiciary Committee provided that detrebling would be extended only to joint production ventures (1) whose principal facilities are located in the United States or its territories; and (2) whose participants make a substantial commitment to the United States economy, as evidenced by investments in the United States, (i.e., long-term production facilities) and by significant contributions to employment in the United States. The Department of Justice opposed this provision out of concern that the legislation (1) was inconsistent with the administration's overall trade policies; (2) would likely give rise to retaliation by U.S. trading partners; and (3) could deter the formation of joint production

ventures between U.S. firms and foreign firms with access to technologies unavailable to U.S. firms.

Last year, the Senate passed a revised version of S. 479. The revised Bill succeeded largely because it included a compromise "domestic content" provision that was less stringent than its analogue in the 1991 Bill. The compromise section provided that the extended NCRA would apply only to joint venture participants --

(1) who provide substantial benefits to the U.S. economy, including,

- increased skilled job opportunities in the U.S.;
- investments in long-term production facilities in the U.S.;
- participation of U.S. entities in the venture; or
- the ability of the U.S. entities to access and commercialize technological innovations or realize production efficiencies; and

(2) whose ventures' production facilities are located in the U.S. or whose principal facilities are located in a country whose antitrust laws accord national treatment[1/] to U.S. entities participating in production joint ventures.

The purpose of this compromise provision was to ensure that all joint production ventures that meet the "substantial benefits" test receive equal treatment, regardless of the nationality or location of the participants.

1/ "National treatment" means treatment under a foreign country's antitrust laws that is no less favorable than the treatment that firms located in that foreign country would receive if they participated in a similar joint production venture.

The current legislation, while not so permissive as the Senate-passed bill, would probably not discourage the types of joint production ventures for which the proposed extension of the NCRA is intended to provide clarified antitrust standards.

H.R. 1313 is likely to achieve its objectives for several reasons. First, its domestic content limitation does not apply to R & D joint ventures. Second, it does not limit use of rule of reason antitrust analysis in any respect. Third, the clause requiring national treatment as a prerequisite of detrebling benefits should not pose significant problems because the antitrust codes of most major industrial states parallel the U.S. antitrust laws.

Mr. BROOKS. Our next witness is John Pickitt who, before becoming president of the Computer & Business Equipment Manufacturers Association, served as Director of the Defense Nuclear Agency and Commander of the First Air Force, where he planned and guided the modernization of the Command, Control, and Communications Computer System.

We are delighted to have you with us. You may proceed, sir.

STATEMENT OF JOHN L. PICKITT, PRESIDENT, COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION, ACCOMPANIED BY SIMON LAZARUS, GENERAL COUNSEL, CBEMA, AND ATTORNEY, POWELL, GOLDSTEIN, FRAZER & MURPHY

Mr. PICKITT. Thank you, Mr. Chairman.

I am appearing today on behalf of the Computer & Business Equipment Manufacturers Association, CBEMA, a trade association that represents leading providers of information and technology products and services in the United States.

Accompanying me this morning is Si Lazarus from the firm of Powell, Goldstein, Frazer & Murphy, who is our general counsel.

Mr. BROOKS. We are delighted to have him. I have known him a long time.

Mr. PICKITT. Thank you, sir.

I want to thank you and your original cosponsors, Representatives Hamilton Fish and Don Edwards, and your other colleagues on the Judiciary Committee, as well as your dedicated staffs for convening the hearing today.

More importantly, I want to thank you for your committee's hard work over the past several years in developing a package that represents and has yielded a strong consensus for an excellent piece of legislation, the National Cooperative Production Amendments of 1993, H.R. 1313.

The bill is an important step in promoting a more competitive high-technology economy by extending the National Cooperative Research Act of 1984 to cover production joint ventures. CBEMA's members include many of the largest America manufacturers of computer and business equipment and they employ over one million people in the United States. These firms had combined sales of over $220 billion in 1991, and represent nearly 5 percent of our Nation's gross national product.

In recent years, our members have experienced escalating costs of research and development, shortened production lives, intensified domestic and international competition, all of which have made it increasingly difficult for even the largest of firms to develop and commercialize new technologies on their own.

Congress recognized this new reality of the global marketplace when it passed the 1984 act. The legislation before us today reflects further recognition that the risks and complexities of making new products from new ideas requires intercompany alliances in manufacturing as well as research and development.

The increased pace of innovation has made it more imperative than ever that American information technology firms be positioned to respond quickly with state-of-the-art production facilities

if they are not to lose the competitive advantages that their innovations yield.

Production joint ventures permit the efficiencies associated with large-size businesses to be enjoyed while still preserving the innovative values associated with competing smaller businesses. As such, production joint ventures are an alternative to and in many circumstances superior to the merger and consolidation of otherwise competing firms.

CBEMA supports H.R. 1313 because this bill accomplishes its objective by providing an important modification of the antitrust laws without reducing vital competitive protections.

Let me emphasize two important procompetitive points that are frequently overlooked when discussing the legislation.

First, your proposal does not take away any rights of action a plaintiff may have in an antitrust case. To the contrary, by giving competitors advanced notice of what a joint venture is going to be doing, you give them a chance to file for injunctive relief before any harm is done.

Secondly, your proposal does not extend to joint marketing of a product or service. Although I believe most joint ventures will produce key components that the partners of the venture will use in their products, if the partners want to market the product of a joint venture, they will have to do so individually.

Consumers will enjoy the benefits of new products which would not have been made available without the joint effort, they will also have as many sources of the products as before. Unlike mergers or acquisitions, joint manufacturing will not reduce the number of manufacturers offering the product.

It should be noted that H.R. 1313 departs from its predecessor in one material respect. The provisions of the bill only cover production joint ventures where the production facilities are located in the United States and only apply to joint ventures where participants are either U.S. companies or foreign companies headquartered in countries in which the antitrust laws, or those laws functionally equivalent to the U.S. antitrust laws, treat U.S. firms no less favorably than their domestic firms.

As you know, Mr. Chairman, CBEMA's members and others have registered some concern that provisions discriminating against foreign firms could have an adverse, unintended effect on the competitive needs and interests of U.S. firms.

We believe that the compromise reflected in this section of the bill is workable and will minimize risks of such adverse effect.

As you noted, the bill enjoys the strong support of President Clinton and I would like you to know that in concluding, I want to commend you and your colleagues for bringing the bill forward so early in the 103d Congress and CBEMA stands ready to assist you in any way possible during its passage.

Thank you.

Mr. BROOKS. Thank you, Mr. Pickitt.

[The prepared statement of Mr. Pickitt follows:]

Prepared Statement of John L. Pickitt, President, Computer & Business Equipment Manufacturers Association (CBEMA)

Mr. Chairman, on behalf of the Computer and Business Equipment Manufacturers Association ("CBEMA"), a trade association that represents leading providers of information technology products and services in the United States, I thank you, your original co-sponsors Representative Hamilton Fish, Don Edwards, and your other colleagues on the Judiciary Committee, as well as your dedicated staffs for convening this hearing today, and, more importantly, for the hard work over the past several years that has yielded a strong consensus on an excellent piece of legislation, the national Cooperative Production Amendments of 1993, H.R. 1313. The bill is an important new bill to promote a more competitive, hi-technology economy by extending the National Cooperative Research Act of 1984, which has encouraged joint research and development ventures, so that the same protections cover production joint ventures as well.

CBEMA's members include many of the largest American manufacturers of computer and business equipment and employ over one million people in the U.S. These firms had combined sales of over $220 billion in 1991, and represent nearly 5% of our nation's gross national product. In recent years the experience of our member companies has been that the escalating costs of research and development in the information technology sector, shortened product lives, and intensified domestic and international competition have made it increasingly difficult for even the largest of firms to develop and commercialize new technologies on their own. Congress recognized this new reality of the global market-place when it passed the 1984 Act. The legislation before us today reflects the further recognition that the risks and complexities of making new products from new ideas requires inter-company alliances in manufacturing as well as R&D.

While other U.S. industries share this concern, it is particularly important in the information technology industry, because U.S. firms and laboratories remain at the forefront of research and development in many critical technologies. But the strength of U.S. research is not matched by our ability to bring the products that are the by-product of that research to market. The increased pace of innovation has made it more imperative than ever that American information technology firms be positioned to respond quickly with state-of-the art production facilities if they are not to lose the competitive advantage that their innovations yield.

Production joint ventures are one way to achieve this objective. Production joint ventures permit the efficiencies associated with large-sized businesses — such as the ability to raise capital and accomplish rapid large-scale plant construction — to be enjoyed, while preserving the innovative values associated with competing smaller businesses. As such, production joint ventures are an alternative to, and in many circumstances superior to, the merger and consolidation of otherwise competing firms. They are in many cases a preferred solution to the risk of business failure or of underproduction if single firms are forced to "go-it-alone."

H.R. 1313 not only enhances the 1984 National Cooperative Research Act — itself also produced by this Subcommittee — but builds on the successful experience of that law. Since that Act was passed, more than 200 R&D joint ventures have been formed under its auspices, nearly all of them successful. In our own industry we can see the benefits of this law in the formation of Sematech, the industry-government consortium whose mission is to restore the U.S. world leadership in semiconductor manufacturing technology. I am very familiar with Sematech, because several CBEMA members are active participants in this venture. President Clinton has hailed Sematech as a model for the Clinton Administration's technology policy. I believe it is well known that if Congress had not put the risk-reducing features of the 1984 Act in place, it is likely that some of its key members would have refrained from joining, and the whole initiative might have never been born.

The experience of Sematech shows, definitively, Mr. Chairman, first, how essential the inducements provided by this legislation can be in spurring the formation of pioneering inter-company initiatives, and, second, how dramatic and constructive the market-place results can be.

CBEMA's members support H.R. 1313, because this bill accomplishes its objective by providing an important modification of the antitrust laws, without reducing vital competitive protections. Under the provisions of H.R. 1313, production joint ventures that follow the notification procedures set forth in the NCRA would be analyzed under a rule of reason, rather than a per se standard if challenged. This provision would codify existing law, not change it. If a violation is subsequently found these ventures would be subject to actual rather than treble damages. And, finally, the bill would apply to production joint ventures the third protection introduced by the 1984 Act, the opportunity for courts to shift defense fees to plaintiffs who bring an unsuccessful claim frivolously or in bad faith.

Let me emphasize two important pro-competitive points that are frequently overlooked when discussing this legislation. First, your proposal does not take away any rights of action a plaintiff may have in an antitrust case. To the contrary, by giving competitors advance notice of what a joint venture is going to be doing, you give them a chance to file for injunctive relief before any harm is done. Secondly, your proposal does not extend to joint marketing of a product or service. Although I believe most joint ventures will produce key components the partners of the venture will use in their products, if the partners want to market the product of the joint venture, they will have to do so individually. Consumers will not only enjoy the benefits of new products which would not have been available without the joint effort, they will also have as many sources of the product as before; unlike mergers or acquisitions, joint manufacturing will not reduce the number of manufacturers offering the product.

However, it should be noted that H.R. 1313 departs from its predecessor in one material respect. The provisions of the bill only cover production joint ventures where the production facilities are located in the United States, and only apply to joint ventures where participants are either U.S. companies or foreign companies headquartered in countries in which the antitrust laws, or those laws functionally equivalent to the U.S. antitrust laws, treat U.S. firms no less favorably than domestic firms. As you know, Mr. Chairman, CBEMA's members and others have registered concerns that provisions discriminating against foreign firms could have adverse unintended effects on the competitive needs and interests of U.S. firms trying to compete world-wide. We believe that the compromise reflected in this section of the bill is workable and will minimize the risk of any such adverse effects.

In concluding, I want to commend you and your colleagues for bringing this bill forward so early in the 103rd Congress. I also wish to point out that the National Cooperative Research Act Amendments of 1993 are themselves the product of a remarkable bi-partisan and bi-cameral "joint venture." Indeed, the five year process that has culminated in this bill has involved both Democrats and Republicans, and members of both the Senate and the House of Representatives. The bill's current sponsors also include Senator Patrick Leahy, Senator Joe Biden and Senator Strom Thurmond. Perhaps most significantly, the bill enjoys the strong support of President Clinton who has hailed H.R. 1313 as an important measure that will "create jobs and build a more competitive, high-tech American economy" and who has praised it as "just the kind of forward thinking initiative we need to drive our economy toward a decade of creative change." I hope that the National Cooperative Production Amendments of 1993 signal a long and productive collaboration between the Congress and the Administration to restore the competitive strength of the American economy.

Mr. BROOKS. Our next witness is Pat Choate, economist and former vice president for policy analysis at TRW. He has written extensively on competitiveness issues. His most recent book, "Agents of Influence," addresses the role of politics in global economic competitiveness.

I understand you are really from Waxahachie.

Mr. CHOATE. I am.

Mr. BROOKS. This is a far cry from Waxahachie.

Mr. CHOATE. It is.

Mr. BROOKS. Mr. Choate is presently director of the Manufacturing Policy Project here in Washington.

We are delighted to have you, Mr. Choate.

STATEMENT OF PAT CHOATE, DIRECTOR, THE MANUFACTURING POLICY PROJECT

Mr. CHOATE. Mr. Chairman, thank you very much.

Damon Runyon once wrote in the 1930's that the race may not go to the swift and the strong, but that is how to bet your money right. That is the same way I think about economics.

When one takes a look at American industry and the global economy, we have to find the ways and means to make American industry swift and strong.

Now, one of the reasons that the country's industries have not been able to compete is they lack some of the options that other industries in other countries have to work together. I think H.R. 1313 cuts out some underbrush that is hampering American industry today.

The second thing that is very clear is that American industry today is facing competition that is organized in a very different way in Europe and in Japan and Korea than in the United States. These industries operate, as this committee has studied before, in giant keiretsus that have banks that stand in the center, and these banks are backed by their governments. They literally cannot go bankrupt. These are competitors who cannot go bankrupt.

When one takes a look at Germany, one finds that Deustchebank has effective control of the hundred largest industries in Germany. Again Deustchebank is backed by the German Government which means that those competitors effectively cannot go bankrupt.

American industries and American companies don't have those assurances. Ultimately they can't afford to have waste and duplication of their talents and their people and their capital investment. Ultimately they have to be able to work together and work together in a socially responsible manner that does not harm American consumers or other industries.

Now, I am an economist and not a lawyer, but reading H.R. 1313 through an economist's eyes, I think it does some things that need to be done in this economy. It permits our companies to come and work together. It allows them to do it with greater assurances of no frivolous lawsuits, primarily private lawsuits.

It assures the public that they know what is going to happen, and I would presume under the reporting requirements the Justice Department is required to file an annual report in which they identify the competitive position of industries, and thus it will be possible for this committee and other committees of Congress to do a

rather aggressive oversight and assure that the intentions of that act are fulfilled.

Ultimately, what this means, then, is that American companies, if they choose to, have some options so they can be swift and strong. And so in sum, it seems like a worthwhile piece of legislation that should be moved forward rapidly and I congratulate you and Mr. Fish on introducing it.

Mr. BROOKS. Thank you very much.

[The prepared statement of Mr. Choate follows:]

Testimony
of
Pat Choate
Director, The Manufacturing Policy Project

Before
The Committee on the Judiciary
United States Congress
Washington, D.C.
March 18, 1993

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to share some thoughts with you on the importance of the National Cooperative Production Amendments of 1993 to U.S. competitiveness in global markets.

While several of my colleagues on this panel are distinguished antitrust attorneys, my perspective is that of an economist and author and my testimony draws upon research that I am doing for a forthcoming book on the role of cartels in international competition.

AN UNFORGIVING REALITY

As you note, Mr. Chairman, in your news release and opening statement, it is time that we examine "the reality of the international marketplace with no illusions." And that reality is the performance of American industry has neither kept up with its own prior performance nor with that of its foreign competitors. It has been unforgiving reality, one in which America has lost position in those industries that you identify, Mr. Chairman -- steel, shipbuilding, machine tools and consumer electronics. But as costly as those losses are, they are only a fraction of the decline in industries where US firms were long-considered impenetrable -- advanced computers, semiconductors, aircraft, telecommunications, pharmaceuticals, scientific instruments, industrial chemicals, engines, turbines, plastics, automobiles, synthetics, insurance, engineering services, construction, banking and many others.

This loss of position -- evident in lost market share, lost jobs, diminishing profits, lagging investment, and waning technological supremacy -- is spreading, undermining the foundations of one allied industry after another -- basic, high-tech, and services.

Many explanations for this decline have been offered. Poor management. Unbalanced macroeconomic policies. High taxes. Excessive regulation. Poor work force performance. Predatory trade practices. Wall Street demands for more and shorter-term earnings. Unrealistic demands by unions. The list goes on, but none fully describes what is happening.

Yet each explanation is ultimately a glaring symptom of a much deeper, more pervasive malady, one that is paralyzing all U.S. institutions. It is our inability, even our unwillingness, to view the global marketplace without illusions and to adapt to the reality of international competition as it is, not as we wish were.

And what is that reality? It is that other leading industrial nations have organized themselves to compete in ways, both manifest and subtle, that are different from our own. They target industries. They sacrifice the interests of consumers for producers. They commit their national resources and diplomacy to increased market share and ultimately to industrial dominance. They use cooperative ventures, and often cartels, as a means to advance their national industrial base. And perhaps most important, the leading companies in those targeted industries often have an absolute assurance from their governments that they can never, never, will bankrupt.

When U.S. companies pit themselves against European aircraft makers, for instance, they are ultimately pitted against four national governments -- Great Britain, Spain, Germany and France -- who underwrite those companies. When American electronics and arms makers compete against certain French companies, such as Thompson, they compete against the Government of France since many of these companies are state-owned. When U.S. corporations compete against Japanese industry, regardless of what that industry may be, they are competing against an enterprise in which the line between state and industry is virtually indistinguishable -- a system in which companies are partially owned by banks who themselves have access to unlimited funding from the Government of Japan.

Under these rules of engagement, global competition for American entrepreneurs and firms is a bet your company gamble. And we are losing.

In itself, the National Cooperative Production Amendments of 1993 cannot bridge the structural incompatibilities that exist between the economies of the United States and those of Europe and Asia. New and different trade and foreign policies are required for that.

But this Act can do much to strengthen the competitiveness of American companies by allowing them to share information, people, research and production. It can reduce the massive waste of talent and money created by

the wasteful duplication inherent in our current ways of doing business. It can provide an environment where American companies can work together and with greater legal assurances against frivolous lawsuits. Equally important, the reporting requirements of the proposed legislation provides Congress and the public information they need to keep track of these joint ventures and the global competitive position of the affected industries.

In short, these Amendments can do much to help American industry meet the competitive challenge it now faces in global markets. And as I read the act – admittedly through the eyes of an economist rather than those of a lawyer – it does so without creating an exemption to the antitrust laws and without impeding broader national or private efforts to deal with foreign cartels that may be operating either inside or outside the United States.

Put another way, the most assured way for the United States to meet the challenges of a fast-paced, sharply competitive, highly uncertain future is to improve the ability of our entrepreneurs and companies to innovate, invest, and quickly take a product or service from development to production to market domination, and then on the next generation of product or service, and in which government can maintain an environment that facilitates whatever adjustments are needed and do so in a common-sense, socially responsible manner.

I believe that the National Cooperative Production Amendments of 1993 meets that standard, that it can increase the flexibility of our companies and enable them to deal with the world as it is. It certainly seems worth doing.

Thank you.

Mr. BROOKS. Our fourth witness is Arthur M. Kaplan, an attorney who practices antitrust law with the firm of Fine, Kaplan & Black in Philadelphia.

I note with some interest that his current antitrust representation includes the State of Florida in antitrust litigation against BellSouth, one of the regional telephone operating companies.

We are delighted to have you, Mr. Kaplan.

Mr. KAPLAN. Thank you.

Mr. BROOKS. If you want to make an aside on that, we would be pleased to hear it.

STATEMENT OF ARTHUR M. KAPLAN, ATTORNEY, FINE, KAPLAN & BLACK

Mr. KAPLAN. Good morning.

Thank you very much, Mr. Chairman and members of the committee, for permitting me to testify. I testified several years ago with respect to the bills that were pending and if I might express an opinion, I think the committee has made great progress since then.

The chairman's bill is a considerable improvement over the bills that were being considered at that time. First and foremost, it is explicitly limited to joint production facilities located here in the United States, generating jobs here in the United States.

In my earlier testimony, I was somewhat critical because the bills did not limit protection to domestic facilities generating jobs here. I applaud the committee for bringing the terms of the legislation into line with its rationale.

Secondly, H.R. 1313, although it contains no express limitation on the combined market share of the participants, does at least preserve single damages as a remedy for injured competitors and injured consumers, if there is antitrust injury.

On balance, I support the bill because, as the chairman noted, there is at least a perceived need and a perception, if not a reality, that the antitrust laws currently inhibit procompetitive ventures.

There is, however, one very important change that I would recommend that is entirely consistent with the purpose of the bill. Although the bill expressly precludes various abuses of joint ventures for improper purposes such as market allocation, it nowhere expressly addresses price fixing. As this committee well knows, price fixing is the most pernicious of antitrust violations and there can be no reasonable fear of overdeterring price fixing.

Subparagraph (b)(1) of the existing legislation (codified in 15 U.S.C. 4301) dealt with price fixing by expressly excluding from all of the bill's protections any exchanges of price information unless the exchange was necessary to conduct research and development.

The current bill, however, removes the research and development language from subsection (b)(1) and broadens the scope of protected joint ventures.

Given this subtle but important change in wording of subsection (b)(1), and the redefinition of joint ventures, joint venture participants may very well argue in court, contrary to the intent of this legislation, that the exchange and discussion of price information regarding current prices, or even future prices for the joint venture product or conceivably competing products, is protected.

Under revised subsection (b)(1), the new test would be whether exchanging price information is, "reasonably required to carry out the purpose of the venture."

I am concerned that any aggressive or even imaginative defense lawyer might argue that the purpose of a successful joint venture is necessarily profitable joint production and that profitable joint production requires a frank discussion of pricing for the joint venture product, both current and future pricing.

Indeed, Mr. Chairman, I believe that an aggressive or imaginative defense lawyer would argue that the legitimate purpose of profitable joint ventures for production under this legislation would require and protect even a discussion of current and future pricing for competing products, because the price of a competing product will limit the price of the joint venture product, thereby limiting its profitability.

Unfortunately, subsection (b)(1) is the only limitation expressly mentioning price, and I believe that any imaginative or aggressive defense lawyer would certainly argue that the failure to expressly address price in any other subsection or limitation was intentional rather than inadvertent.

The potential practical consequence of this inadvertent omission should not be underrated. The bill permits competitors with even 100 percent market share to participate in a single joint venture. It permits officers of competing corporations to sit down together in private, even if the participants in those meetings have ultimate price authority.

Yet the bill automatically detrebles damages and substitutes the rule of reason. Under this bill, hardcore price fixing could become subject to rule of reason justifications and could be effectively immunized from treble damages. That clearly is not the intended effect of the bill, yet in some circumstances it could become the inadvertent yet principal effect.

Even clear legislative history may not be a remedy because as the chairman knows, some courts conveniently disregard legislative history, even unconflicted legislative history, when the words of a statute appear to be plain.

For this reason, I would urge the committee to amend the bill so as to bring its terms in line with its intent and expressly exclude from the bill's protection any and all price exchanges, price discussions, and price fixing.

I note that the Supreme Court has often held that price exchanges and price discussions can easily give rise to tacit price fixing.

I thank you for giving me the opportunity to support this bill which I think in various respects strikes a reasonable balance and corrects misperceptions about the antitrust laws. I also thank you for giving me the opportunity to express the need for this important clarification.

Mr. BROOKS. Thank you very much. I hope you will carry that same questioning attitude to your lawsuit with BellSouth. God knows, you are looking under every rock.

[The prepared statement of Mr. Kaplan follows:]

Prepared Statement of Arthur M. Kaplan, Attorney, Fine, Kaplan & Black

Good morning, Mr. Chairman and members of the Subcommittee. I am Arthur M. Kaplan. I practice law in Philadelphia with the firm of Fine, Kaplan and Black. For the past twenty years, I have practiced antitrust law, usually on behalf of plaintiffs, but also on behalf of defendants, including major corporations. I have been an officer of COSAL, the Committee to Support the Antitrust Laws, for the past several years.

I very much appreciate the opportunity to testify again in the continuation of your hearings concerning proposed joint venture legislation. Since I testified at an earlier hearing three and one-half years ago on four joint production bills, I can see that you have made tremendous progress.

The Chairman's bill, H.R. 1313, is in my opinion a considerable improvement over the bills considered at that time.

First, and most important, it is explicitly limited to joint production facilities located in the United States, generating jobs here. As you may recall, my earlier testimony criticized various proposals for the absence of limitation to domestic production. Second, although H.R. 1313 contains no express limit on the combined market share of the joint venturers, it at least preserves single damages for injured competitors and injured consumers.

There is, however, one essential change that I would recommend that is entirely consistent with the bill's purpose. Although the bill expressly precludes abuse of joint ventures for other improper purposes, such as market allocation, it does not expressly address price fixing.

As the Committee well knows, price fixing has long been recognized by the Supreme Court and others as the most egregious of antitrust violations. The Supreme Court reiterated this, during its 1992 term, in Federal Trade Commission v. Ticor Title Insurance Co., 112 S.Ct. 2169, 2180 (1992). There can be no reasonable fear of over-deterring price fixing, because it is the most pernicious and economically injurious of antitrust violations.

Subparagraph (b)(1) of Section 2 of the National Cooperative Research Act of 1984, now codified at 15 U.S.C. § 4301(b)(1), dealt with price fixing by expressly excluding from the term "joint research and development venture" any exchange of information among competitors relating to "price" unless "reasonably required to conduct the research and development that is the purpose of such joint venture." (Emphasis added). The current bill, however, removes the "research and development" limitation, and broadens the scope of protected ventures to include production.

Given both the subtle change in wording of (b)(1), and the expanded definition of joint ventures, joint venture participants may argue in court that an exchange of information regarding current prices, or even prospective prices, for the joint venture-product or competing products is protected. Under (b)(1), the test is whether exchanging information is "reasonably required to carry out the purpose of such venture."

An imaginative defense lawyer might argue that the "purpose" of any successful joint venture is profitable joint production, and that the "purpose" of profitable joint production "reasonably" requires frank discussion of the current and future pricing of the joint venture product. An imaginative defense lawyer might further argue that the legitimate "purpose" of profitable joint production also requires a frank discussion of the current and future pricing of competing products, since the price of competing products may limit the joint venture price.

Moreover, Subsection (b)(1) is the only limitation expressly mentioning "price". An imaginative defense lawyer would argue that the failure to categorically prohibit "price" exchanges, "price" discussions, "price" agreements, or "price"

fixing, anywhere in this bill, was intentional, rather than inadvertent.

The potential, practical consequence of this omission should not be underestimated. The bill permits competitors with up to a 100% market share to participate in a joint venture. The bill permits officers of competing corporations to sit down together, in private, even if those officers have ultimate price authority.

Indeed, production joint ventures often will personally involve competing chief executives. Under the bill, there is no mandatory monitoring or recording of the resulting conversations.

Yet, the bill de-trebles damages, alters rules on attorneys' fees, and substitutes the rule of reason for per se illegality. Under this bill, hard core price fixing could become subject to rule of reason justifications, and also could be immunized from treble damages.

This plainly is not the bill's intent. Yet, without an amendment categorically denying the bill's benefits to any price exchange, price discussions, price agreement or price fixing, this may be the bill's unintended effect -- and in some circumstances perhaps even its principal effect. Even legislative history to the contrary may not suffice, because

some courts disregard, even unconflicted, history when the words of a statute appear plain.

For this reason, I urge the Subcommittee to amend the bill, so as to expressly exclude from the bill's protection any and all price exchanges, price discussions, price agreements, or price fixing.

Three years ago I questioned whether there is a real need to extend the existing National Cooperative Research Act into joint production.

However, I freely concede that there is a perceived need for joint production legislation. Lest antitrust become the whipping post for problems not of antitrust's making, I support the current bill, as long as the bill is clarified with language expressly excluding price exchange, price discussion, price agreement, and price fixing from the bill's protection.

Mr. BROOKS. Our fifth witness is William D. Coston with the firm of Venable, Baetjer, Howard & Civiletti here in Washington. I understand you now have associated with you former Congressman Frank Horton of New York, who served with me for some 30 years on the Government Operations Committee and is a very fine man. I am sure you will enjoy having him down there.

STATEMENT OF WILLIAM D. COSTON, PARTNER, VENABLE, BAETJER, HOWARD & CIVILETTI, ON BEHALF OF THE COMPAQ COMPUTER CORP.

Mr. COSTON. Mr. Chairman, Congressman Horton said I should pass on to you that the principal thing he misses about serving in Congress is the enticing aroma of your cigar.

Mr. BROOKS. I will send him one. He hates them.

Mr. COSTON. Mr. Chairman, members of the committee and committee staff, thank you for asking me to appear here today. I am here on behalf of Compaq Computer Corp., a great success story in American commerce. It is a Houston, Texas-based manufacturer of personal computers, file servers, and printers. I appeared here several years ago also on behalf of Compaq.

I want to express my congratulations to the committee, along with the other members of this panel, for the hard work that the committee has put in as my prepared remarks indicated. I think that the cooperation that the Republicans and Democrats have shown working with the President is a real inspiration to American industry.

If you all can cooperate to come up with such a sound piece of legislation, that gives us the incentive to enter into procompetitive joint ventures.

The record is very clear, Mr. Chairman and Members, of the need for the legislation. I will not dwell and try to add to that rich history. Instead, let me take on two of the principal criticisms which we still hear about the legislation.

First, it really isn't necessary and it is really an exemption from the antitrust laws; and second, there is a xenophobic element to the legislation that we are really trying to protect our domestic industry at the expense of foreign competition.

Let me say that my view of the antitrust laws, Mr. Chairman, is not that they should simply punish bad behavior. The antitrust laws ought to serve as an encouragement to good behavior and I think this bill does just that. It says we want American industries to work together to enter into procompetitive joint ventures.

It is good for the economy, good for the country, good for the domestic work force, and I think that this committee's work best serves that purpose of the antitrust laws of not simply being a deterrent to bad behavior, but being an incentive to good behavior.

With respect to the second criticism, Mr. Chairman, that this is sort of a xenophobic piece of legislation, I commend the chairman for having simulated this issue in the past bill, and having forced members of the industry really to address that point and to come up working with you with a bill that does address that point.

The principal facilities resolution, I think, is a very sound compromise. One way of looking at it is that it is really no more than a jurisdictional point that if the principal facilities of joint ventures

are abroad, there is an argument that the U.S. antitrust laws don't apply anyway and the principal facilities argument does no more than reflect the very practical jurisdictional reach of the antitrust laws.

So we can then point to that provision and say this is not antiforeigner. This is not punishing foreign competition, but it is just carving out where we want the scope of the U.S. antitrust laws to apply.

At the same time, it does promote the chairman's real honest, heartfelt goal of helping the U.S. industry; that by having facilities here, the production joint venture applicants will be certain to increase employment in this country. I think the compromise is a good one.

The production facility doesn't distinguish against a foreign participant or encourage a domestic participant. It is really neutral on the subject of country of origin of the participant. In fact, you could have two German companies with a U.S. production joint venture, a German and Japanese company with a production joint venture, or two U.S. companies with a production joint venture.

As long as the principal production facilities are here, that corresponds nicely with the jurisdictional reach of the U.S. antitrust laws.

For Compaq, I think it is important that the bill does have that provision allowing foreign participation in joint ventures. Compaq is a worldwide competitor in the personal computer business. A substantial percentage of their sales are abroad, principally in Europe. They have entered into strategic alliances with a number of very fine U.S. companies, but as well with some foreign companies that bring to the table unique technologies, often technologies that are covered by intellectual property laws. If we can't have access to foreign technologies, then we will suffer as a U.S. competitor.

Let me just close, Mr. Chairman and members of the committee, by saying I agree with Mr. Rill and to some degree disagree with my colleague that anticompetitive behavior will be encouraged or sanctioned by this bill. I think the bill clearly prohibits anticompetitive practices such as price fixing, market allocation and market exclusion, and the best part of about this legislation is that it underscores and implements the well-established purposes of the antitrust laws.

On behalf of Compaq Computer, I thank you for all your efforts.

Mr. BROOKS. Thank you very much.

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On behalf of Compaq Computer, I thank you for all your efforts.

Mr. BROOKS. Thank you very much.

[The prepared statement of Mr. Coston follows:]

suspect: we are not a society which looks with favor on exemptions.

Rather, the issue here is not what conduct should be exempted from antitrust scrutiny but, instead, what conduct should be encouraged by the antitrust laws. I submit that we ought to have legislation which will encourage American businesses to cooperate where necessary and to form production joint ventures so that they can be successful competitors in the international markets.

In this regard, the antitrust laws have been, to some degree, an impediment, whether real or imagined, for U.S. companies getting together in pro-competitive, cooperative ventures to produce goods and to compete in international markets. That is unfortunate. Antitrust laws should not be a set of laws that act as a deterrent to bad behavior exclusively. Antitrust laws and antitrust policy should also have a positive feature. They should encourage good behavior, not just penalize and punish bad behavior. The antitrust laws should send a message to American companies: this is what you can do. This is what we want you to do. These are the incentives we are offering to you to get out there and be competitive.

This issue, production joint ventures, is clearly an area where we have an opportunity, from a public policy perspective, to give U.S. industry an incentive to be competitive. If it is necessary to join with other companies to invest in building new production facilities, we can give you an incentive to do that. We can eliminate the deterrent value that some perceive in current antitrust policy.

To me, a joint venture will usually be a preferable public policy alternative to a merger. One of the major pluses of this legislation is to encourage production joint ventures, the pooling of resources for discreet ventures, rather than encouraging companies to merge. Particularly because of the development of Merger Guidelines by the antitrust enforcement agencies, antitrust counsellors are able to predict with reasonable certainty the propriety of proposed merger transactions. In the production joint venture field, however, while some good guidelines do exist, they do not provide the same kind of certainty and comfort to businesses. Passage of this legislation, while not defining completely the relevant factors of analysis in assessing the antitrust propriety of a joint venture, will, nonetheless, take some of the antitrust risk out of a proposed joint venture transaction. As

significant, the publication process will permit the public to learn of proposed production joint ventures and comment on their antitrust propriety, a process which will enable private firms and their lawyers to minimize long-term risk through the short-term disclosure.

Now to the more sensitive topic: whether this legislation should benefit exclusively, or even primarily, U.S. companies. I commend the Chairman for having stimulated the issue and having required us to address the very real concerns of promoting and preserving the domestic economy. I also commend the Chairman for the wisdom he has shown in working with Representatives Fish, Edwards, Boucher and others, as well as the bi-partisan support in the Senate, for a proper resolution of this issue. The record evidence to date is very strong that foreign firms often bring to the joint venture the very technology, as well as the capital, which U.S. companies require. Excluding from participation in a production joint venture companies with foreign ownership, in fact, might have denied U.S. companies the very benefits which production joint ventures produce: a sharing of technology and capital which is not available to single firms. This bill, with its current legislative craftsmanship, addresses the issue of benefit to

the domestic economy -- by requiring "principal facilities" in the United States -- while at the same time not denying U.S. companies access to foreign technology, know-how, and capital. Indeed, one can argue that the "principal facility" in the bill is as much a jurisdictional matter. A production joint venture with principal facilities abroad may not, in fact, even be subject to United States antitrust laws, at least as concerns the construction of the facility and production of product. Joint marketing activities are not affected by the principal production facility provision; indeed, the bill does not concern joint marketing whatsoever. I should note as well that the principal production facility measure is not in any way discriminatory -- its requirements are imposed on any production joint venture, whether consisting entirely of domestic-based companies or entirely of foreign-based companies. As such, it underscores to me the notion that the "principal facilities" position is as much jurisdictional as substantive.

This legislation clearly preserves the full power of the antitrust laws against clearly anti-competitive practices, such as price fixing, market allocation, and market exclusion practices. Because the legislation underscores and implements the purposes of the antitrust laws, I think it is sound legislation. For Compaq Computer Corporation, I thank you for your efforts.

Mr. BROOKS. Mr. Rill, what is your reaction to Mr. Kaplan's concern that H.R. 1313 would serve to insulate price-fixing activities from treble damage antitrust actions?

Mr. RILL. Mr. Chairman, I think that the argument, if it were made by imaginative and aggressive lawyers, would also be made by uninformed lawyers who haven't studied the provisions of the bill. I see no danger under this bill that it would sanction illegal price-fixing activities.

The law is perfectly clear that hardcore violations, sham joint ventures, would remain subject to antitrust suits to treble damage actions.

There is nothing in this bill that protects naked price-fixing activities. I think any amendment along the lines proposed by Mr. Kaplan would seriously complicate and undermine the basic thrust of the bill.

The bill obviously contemplates, as is the case under current law, the notion that joint production venturers will want to take the products of the joint venture and in a competitive way distribute those products individually.

They are going to have to find some way to get the products out of the joint venture. If they are unable to discuss some terms on which they can get the products out of the joint venture, there is no point in having the joint venture.

I think that Mr. Kaplan, I am sure with genuine concern, raises a concern that is not realistic, that is not one that is raised by the legislation, and I would urge the committee not to attempt to draft any amendments in response to that concern.

This bill will not sanction price fixing, period.

Mr. BROOKS. Now, Mr. Rill, what has been the Department's enforcement experience in your past activities regarding antitrust violations by joint venturers, both in the R&D area and in production and manufacturing?

Mr. RILL. There has been experience in both areas.

In the R&D area, the experience has been quite sparse. So far as I know, there is in modern memory only one action that has been maintained against an R&D joint venture and that was in the 1960's, an action against the Automobile Manufacturing Association for a joint venture involving exhaust emission standards.

I think it is fair to say that the joint venture was more to suppress R&D than to promote R&D and for that reason it was challenged and the case was settled by consent.

I don't have a collection of the cases that have been initiated against production joint ventures, but as is the case, as would be the case under this legislation, anticompetitive production joint ventures, I am confident, will be challenged.

A couple of examples: The Department during the past administration challenged the Westinghouse-CIBA-Brown-Bavery joint venture in large electrical equipment, challenged the locomotive joint venture with railroad tampering, challenged the Reuher-Procter & Gamble joint venture for stomach remedies, and more or less on my way out the door, challenge was raised to the information joint venture of the major airline companies, the so-called airline tariff publishing case.

Not all aspects of that joint venture, by the way, but you can read in the impact statement of the settlement, something that should alleviate Mr. Kaplan's concerns, those aspects of the joint venture which the Department felt constituted a restraint of trade.

So there has been an active and I think very solid enforcement program with respect to production joint ventures which this bill will not discourage. At the same time, those actions have not discouraged the formation of legitimate production joint ventures which take place in the United States.

Mr. BROOKS. Gentlemen, in your experience, what are the most important factors that cause firms to enter into joint ventures? How significant is the perceived risk of antitrust treble damages?

Do you want to start that, Mr. Choate?

Mr. CHOATE. Mr. Chairman, it is my observation that it is a major obstacle. When I was with TRW, even with the R&D joint ventures in the mid-1980's, there was a massive concern about that corporation engaging in even joint R&D ventures because of the threat or the possibility of private action suits.

In fact, there were some law firms that announced that they were going out and hustle up clients to engage in such suits. I think it has been a very real obstacle and I think the same is true for joint production activities.

Mr. BROOKS. Mr. Coston.

Mr. COSTON. Mr. Chairman, I would say a fundamental reason for entering into a joint venture is a technology barrier. Often one company will hold some intellectual property exclusively and will have some experience in manufacturing in connection with that technology. It may end up being a critical technology for a computer, for example, and rather than a strict licensing agreement, it may be in the U.S. company's interests to enter into a joint venture to produce that technology with the holder of the intellectual property. That is one reason that we see in the computer industry.

A second reason—and I think the record is pretty strong on this—is differences in access to capital markets. You may have the need to construct a very expensive production facility that a single company can't afford to obtain the financing for. So those would be two reasons.

Mr. BROOKS. Mr. Pickitt, do you want to add to this, or Mr. Rill?

Mr. PICKITT. Thank you, Mr. Chairman.

Mr. BROOKS. Mr. Pickitt.

Mr. PICKITT. I support the points that have been made. I would add some anecdotal evidence that if Congress had not passed the 1984 act, there are fairly clear indications that some of the major players would not have joined in support.

Because of antitrust concerns, the effort to have a joint venture that was titled "U.S. Memories" about that same time did not take place because of concern for antitrust implications.

Mr. BROOKS. All right.

Mr. RILL. I would simply add, Mr. Chairman, that in our experience we have seen useful approaches to productions in joint ventures which industries are engaging in the rationalization of facilities where there are subsequential or other capability efficiencies to be really realized, something I think is going to be particularly

applicable to the defense industry in times not too far down the road.

We have also seen the kind of applications to joint ventures that Mr. Coston refers to where there are complementary technologies being applied to a joint venture. Shortly we are going to see, for example, a communications satellite, high-powered communications satellite that will have direct broadcasting facilities go up in the air which constitutes a joint venture of the electronics industry, the power industry, and to some extent, the broadcasting industry that will promote that kind of technology being made available in the United States which I think is a very useful—conceptually very useful—type of joint ventures that this bill will remove a cloud from under the antitrust laws.

Mr. BROOKS. Mr. Choate, how does antitrust enforcement in the United States compare with that of our major foreign competitors?

Mr. CHOATE. Well, in the United States, of course, we have the right of the private action suit, which I think had a major effect upon enforcement. When one takes a look at our principal competitor, Japan, what one finds is a very different history than our own.

The antitrust laws were introduced in Japan as part of the occupation: In the very first act that was passed after the occupation was over, 1 month after the occupation was over, MITI went to the Japanese Diet and got the power, on an industry-by-industry basis, to exempt industries from antitrust enforcement.

What one finds today in Japan, which is our principal competitor, is an agency, the Japanese Fair Trade Commission, which, I think, exists more or less to give the impression of antitrust enforcement than actual enforcement. I think they have brought only one or two cases in 17 years.

So what we find there is they are beginning to publish pretty good information where we can have an assessment of what is being done.

As to the type of enforcement we find in this country, it does not exist and the fact that they are publishing more information and being more serious about it in large measure is due to Mr. Rill's work in the SII movement.

Mr. RILL. I appreciate the commendation. I think SII has had a substantial effect on the enforcement on the Anti-Monoply Act by the Japanese Fair Trade Commission.

I agree with Mr. Choate, although I think his numbers understate enforcement activity. I know they do. The fact is there is still a long way to go before the level of enforcement of the Japanese Anti-Monoply Act approximates that of the United States or for that matter the commission of the European Community under the treaty of Rome.

Mr. SCOTT [presiding]. Thank you.

We are going to try to continue the subcommittee hearing and people will vote in stages. There are a couple of other questions I have for you on behalf of the chairman.

Gentlemen, H.R. 1313 by design excludes marketing activities from the scope of the bill's protections. Do you agree that marketing activities can create a much greater opportunity for anticompetitive conduct in the research and production activities?

Mr. RILL. This is an area, Mr. Chairman, that the Department of Justice was very much involved in developing legislation that was endorsed during the Bush administration and sponsored by Mr. Fish, by request.

The administration felt and I think for good reason—the prior administration felt and I think for a good reason that the extension of the protection of the bill to marketing activities would be undesirable. The endorsement, tacit or even expressed endorsement, of marketing activities would create, I think, an implicit sanction for activities that might raise serious question under the antitrust laws, and I personally am pleased to see that that is not included in the current Brooks-Fish legislation.

I think that that does not mean that all joint marketing quite obviously is a per se violation of the antitrust laws where joint marketing activities are reasonably related to a legitimate joint venture or other common activity and this may be an unusual case. They will be tested and if they pass muster as not being a sham activity, then be evaluated under the rule of reason.

I think it is entirely appropriate for the bill not to cover those activities, but to leave them subject to all of the provisions of the antitrust laws as the cases fall.

Mr. BROOKS [presiding]. Mr. Kaplan.

Mr. KAPLAN. I concur in Mr. Rill's comments about the advisability of continuing the limitation on joint marketing that appears in subsection (b)(2). I would note that there is a rule of judicial construction that where two words are used in one section of a statute and only one word is used in another, significance is read into that difference of language.

My concern about the current bill is that while only the word "marketing" is used in section 2, the word "price" and "price and marketing" is used in section 1, the section that I discussed before which has been altered.

I am concerned that because the only prohibition on price exchange and price discussion is the limitation in subsection (b)(1) which has now been altered in a way that arguably makes (b)(1) vague. Therefore, the protections of this bill, which automatically detreble damages and automatically entitle conduct to rule of reason treatment, may unintentionally protect price discussions and price exchanges among competitors.

I would just note that the bill does contain an explicit provision added to the existing law which states, at section 4, that entering into any agreement or engaging in any other conduct allocating a market with a competitor is not entitled to the protections of this bill.

I would simply recommend that there be a similar provision likewise stating that the automatic protections of this bill are not extended to conduct that involves fixing a price with a competitor.

Mr. COSTON. Mr. Chairman, I would only say that I believe the current text of the bill adequately distinguishes between production and distribution and I would beg to differ with Mr. Kaplan that none of the benefits of the bill are automatic.

The detrebling requires publication of the joint venture and in the publication the parties to the joint venture have to disclose, "the nature and objectives of such venture."

The protection that is then afforded is coterminous with the disclosure. If there is no disclosure of any intent to fix prices or to market products, then there is no protection for that activity.

Mr. SCOTT [presiding]. Mr. Pickitt.

Mr. PICKITT. Mr. Chairman, our members support the exclusion as you have it currently structured.

Mr. SCOTT. Thank you.

One final question: Gentlemen, some small firms in past hearings have asserted that there is a real danger that extending antitrust benefits to production joint ventures could lead to industry-wide cartels that could boycott or exclude small or midsized companies.

How do you assess this risk, given the structure of the bill and the reality of the marketplace?

Mr. RILL. Again, this is a matter we looked at while I was at the Department of Justice.

I think that smaller companies are protected under the legislation by the rule of reason analysis of joint ventures that would continue to prevail under the law if this legislation were enacted and if a joint venture were formed and conducted itself so as to exercise market power in an illegal way, then the Department of Justice would attack that joint venture as well as the joint venture would be amenable to private actions to enjoin that conduct and be amenable to private actions for damages if it engaged in that sort of the conduct.

So I think the fact that the antitrust laws remain fully applicable under rule-of-reason analysis adequately protects the interests of consumers as well as other producers.

In the context of the joint venture activity, I think there would be a danger of overly regulatory activity, danger of overly regulatory activity if litigation were designed to require exclusion of entity within a joint venture it not only would be overly regulatory, it might by itself create some megajoint venture that might be in a position to market a power position.

I think the bill strikes a good balance.

Mr. KAPLAN. I do believe the bill attempts to strike a balance and overall it strikes a good balance, but I think we should recognize that treble damages are a formidable remedy for injured competitors and injured consumers.

I think we should also recognize that the protections of the bill do flow automatically from the mere filing of a notice and that the objectives of a joint venture may be defined broadly in the notices that are filed. The notice may define objectives, such as the profitable research and development and joint production of a particular product without identifying the types of discussions that are going to take place.

For that reason, I believe that the bill is wise in expressly excluding agreements or other conduct allocating a market. For the same reason, I would suggest the similar provision regarding price discussions.

Mr. SCOTT. We are going to suspend for approximately 5 minutes for the chairman to return and for the other members to vote and we will be right back.

[Recess.]

Mr. BROOKS [presiding]. The subcommittee will come to order.

The Chair recognizes the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Pickitt, in your prepared remarks on the last page, you mentioned there have been some "concerns that provisions discriminating against foreign firms could have adverse, unintended effects on the competitive needs and interests of U.S. firms trying to compete worldwide."

Could you tell me, Mr. Pickitt, what kind of unintended effects those could be and how this bill addresses those concerns?

Mr. PICKITT. The concerns really spin off of the potential, if it is misinterpreted, for retaliation around the world. The information technology industry is truly global. Our companies not only market externally, to the extent that about 60 percent of the gross revenues are now drawn from sales overseas, but they also source overseas for products or technology.

There are licensing arrangements and royalty flows, all of which make it a very complicated and complex management challenge. A change in the market due to retaliation somewhere else could have an impact on the market, could have an impact on their sales, could have an impact on their sourcing of products and technology.

Mr. SCOTT. How does the bill address those concerns?

Mr. PICKITT. We are comfortable with where we are, sir. We support the bill as you have it structured and we think we can live with this.

Mr. SCOTT. There won't be these unintended consequences?

Mr. PICKITT. That is our view.

Mr. SCOTT. There is discrimination against some countries.

Could you name the countries that would be discriminated against with the present wording?

Mr. PICKITT. I would defer that to Mr. Lazarus. Again, our members are comfortable with where you are.

Mr. LAZARUS. What the bill says is that participants in covered joint ventures either have to be U.S. persons or persons from countries whose antitrust laws do not discriminate against U.S. companies with respect to their participation in production joint ventures.

We have not done an exhaustive review of this, Congressman, but we are not aware of any major industrialized country whose antitrust laws do not provide for national treatment of companies active within their jurisdictions.

Experts in the area have been consulted with and they likewise do not believe that there are major countries that would run afoul of this.

Perhaps Mr. Rill would like to comment on it because he is probably more expert than I am.

Mr. RILL. I don't know if that is the case, but I certainly am familiar with the antitrust laws of Japan, European Community, U.K., Germany, France, Canada, and so far as I know, none of those laws provide for discrimination against U.S. participants in joint ventures in their antitrust analysis.

Therefore, I think that taken literally, the laws of the major industrial nations with which I am familiar would not be subject to the limitations of this bill because they do accord national treatment to U.S. firms.

Mr. SCOTT. So a number of foreign companies could get together with no U.S. companies, so long as they——

Mr. RILL. No, the principal restriction, Mr. Scott, in the bill is that the production facilities have to be located in the United States. The facilities of the joint venture have to be located in the United States.

Mr. SCOTT. So you have a number of foreign companies with domestic plants.

Mr. RILL. With a domestic plant and the laws of those nations must not accord discriminatory adverse treatment to U.S. firms.

Yes, the legislation would apply under those circumstances, but the circumstances may, of course, involve a contribution to employment, technology, and the like in the United States.

That is a somewhat unusual, but not unprecedented situation that you raise. By far and away most of the situations would involve participation by U.S. companies.

Mr. SCOTT. Yes. One more question, if I may, Mr. Chairman.

Approximately 300 ventures have been filed under the present law. Have any of those companies or groups that are filed under the present law ended up getting sued under antitrust?

Can you give me a little bit of information as to what the experience has been?

Mr. RILL. Your numbers are approximately right. I think it is slightly over 300. When the filing occurs, and of course I can only speak for the time that I was there at the Department of Justice, when a filing occurs there is a review to determine whether or not the terms of filing are met, that the adequate information is provided, and that an independent review then would be made if there is a complaint, if there is other information that comes to the department's attention apart from the filing.

So far as I know, there has been no action taken against any of the research and development joint ventures that have been filed under the NCRA.

As I indicated in response to a question from the chairman, I think there has only been one action with respect to a pure research and development joint venture in modern memory. That was the exhaust emission joint venture.

R&D is quite different and tends to be very unusual for an R&D joint venture to raise any antitrust concern. I think it is fair to say that as joint production venture filings occur, you are going to see more of an analysis undertaken.

I would also say many of these joint ventures probably would be required to file under the Hart-Scott-Rodino Act because there would be a sufficient asset transfer to get above the filing thresholds and there would be an independent investigation conducted.

Mr. SCOTT. I guess part of the question is there appears to be a perception problem and if people who have filed in fact experienced no adverse consequences in the law, it seems to be working.

Mr. RILL. The problem with that, Mr. Scott, is that the law as it currently applies covers only research and development joint ventures and people have come in and said, "Look, we are concerned about a venture that is a production joint venture because we are not sure how the law would apply."

The purpose of the legislation, as I understand it, is to expand the coverage of the R&D law, the 1984 law to production joint ventures, so I don't think by the fact that there hasn't been a lot of enforcement activity towards R&D joint ventures suggests that the law is working fully with respect to the production joint ventures.

A clarification might be needed.

Mr. SCOTT. The point I was making is that if we cover the production, people feel secure they are going to be protected so the law as amended would also work and they would not feel a sense of perception is a problem, they would feel protected.

Mr. RILL. I think the law would go a good ways towards eliminating the concerns which the law is attempting to address.

I think that is a good point, Mr. Scott.

Mr. SCOTT. Mr. Kaplan, do you want to make any comment?

Mr. KAPLAN. No, Mr. Chairman. I have nothing to add to that.

Mr. BROOKS. Mr. Inglis, did you have any questions?

Mr. INGLIS. I have already talked to Mr. Rill during the recess.

Mr. BROOKS. Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

I thank you also for putting my opening statement into the record at an appropriate point.

Mr. BROOKS. Without objection, so ordered.

Mr. MOORHEAD. Along the line of previous questions, are there countries whose laws accord equal treatment to us on their face but whose actual practice is to discriminate?

Mr. RILL. Again, just responding for the period of time when I was involved in enforcement of the antitrust laws, we did not have any very substantial events where there was discrimination to U.S. companies in the enforcement of foreign antitrust laws. I can think of a couple of examples that might be of interest.

Initially, the Japanese Fair Trade Commission issued proposed distribution guidelines, that is, guidelines for antitrust enforcement of manufacturing/distributor arrangements and the guidelines treated distribution joint ventures involving foreign companies differently from the way that they were treated with respect to Japanese companies.

Actually we made the point to the Government of Japan that that was not a good idea. We took it up in the SII talks and the Japanese Government eliminated that distinction but that was certainly a potential problem of interpretation of law.

Currently the Government of Japan requires notification for foreign joint venture activities that are somewhat more comprehensive than the notification required of domestic Japanese firms engaging in similar activity. We, that is, the Government of the United States, have raised that point and urged that that distinction be eliminated and that, too, might be considered to be a distinctive treatment under Japanese law of U.S. companies versus domestic Japanese companies.

Those are the sorts of things that might be of interest and, I think, responsive to your question. I think there is a question also of the application of this bill because it refers to the antitrust laws and I think you raise an interesting question with respect to the interpretation of laws, Mr. Moorhead.

Mr. LAZARUS. I would like to comment on that, Mr. Moorhead.

Mr. MOORHEAD. Would it be difficult to ascertain with sufficient precision whether or not the law of a foreign country accords antitrust treatment less favorable than to such country's domestic persons with respect to participation in joint ventures for production? That sounds difficult.

Mr. RILL. Not so difficult as you might think. There are systems of communication that work quite effectively in the international competition arena. We have in the OECD the 24 or so leading industrialized nations of the world that have a communication system that permits us to evaluate the various laws and enforcement policies of the countries.

We have bilateral agreements on competition apology with the EC, with Japan—not with Japan, with the EC, with Germany, with Canada, with Australia, all of which provide for notification of enforcement activities affecting the interests of the other party.

I think those should be expanded but I think, yes, there is a reasonable assurance that we would be aware of this kind of discriminatory application of antitrust law under the current system. It could be improved but I think it is working.

Mr. LAZARUS. Could I just comment on one point that Mr. Rill made?

I would think that a law that required notification of joint ventures in which foreign firms participate would really not be an antitrust law. It really is like Exon-Florio is in the United States and I don't think that would run afoul of this law, at least as I read it.

Mr. RILL. That is certainly a permissible interpretation of the situation that exists under this bill.

Mr. MOORHEAD. There is nothing in legislation that limits the permissible market share of production joint ventures; should there be?

Mr. RILL. No, there should not be. I think that the bill extends as far as it should extend via limitation and production. I think, as I indicated previously, that the extension to marketing is unnecessary and undesirable, could raise some dangers. This does not mean, of course, that all joint marketing would be per se illegal under the antitrust laws.

It isn't now and it wouldn't be if this bill were passed. It would all depend on the nature of the transaction, whether it was reasonably related to a legitimate activity. I think so far as the bill is concerned, it was prudent on the part of the sponsors not to write in something more expansive than the production language that is contained in the current bill.

Mr. MOORHEAD. Mr. Chairman, I yield to the gentleman from South Carolina.

Mr. BROOKS. The gentleman is recognized.

Mr. INGLIS. Thank you, Mr. Chairman.

Even though Mr. Choate is gone, I really am fascinated by this question. Maybe somebody else would like to comment on this.

Is anyone familiar with his book? Have you read "Agents of Influence"?

What I was going to ask him, and I would love for anybody else to comment on this, is the impact of the thesis of that book on this bill.

I am taken with the thesis of the book and really interested in how it might apply here.

Mr. RILL. I don't want to agree or disagree with the thesis of Pat's book. I would simply say from the standpoint of my analysis of the legislation and the application of the legislation, that it doesn't really address and shouldn't address the issues raised by Mr. Choate in his book.

This legislation attempts to deal straightforwardly with an issue of clarification of U.S. antitrust law. It is a narrow, properly confined issue, one of great importance, but not one that attempts to solve, as I see it, or attempts to solve all the problems of world commerce, I think, nor should it.

Mr. INGLIS. Thank you.

Mr. BROOKS. Thank you.

Mr. Mel Watt, the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

I think it probably would be fair to say that I have been a proponent of strong antitrust provisions in laws as protective devices for small businesses, so if I seem a little leery about a bill that seems to weaken antitrust provisions, you will forgive me.

I think I understand the rationale for a bill such as this but I am looking—if somebody can tell me, maybe Mr. Rill or Mr. Pickitt in particular—for specific examples of research and development that the absence of a bill such as this has prevented, first of all, and then going forward, second, to specific examples that the absence of a bill such as this might have had on production joint ventures that you have referred to.

I realize in that context, I may be asking you to speculate a little bit more, but if you could address those two issues, I think it would help to set me a lot more at ease about the bill.

Mr. PICKITT. Yes, Mr. Watt.

Two examples, one for each case. It is reasonably common knowledge that without the 1984 act, Sematech probably wouldn't have happened because there were major corporations that would have been reluctant to participate without the coverage provided by the 1984 act.

Mr. WATT. Is that the research and development?

Mr. PICKITT. Yes. And similarly the reason that "U.S. Memories" did not take place was because of antitrust concerns of some of the major corporations that were invited to participate. So there are some examples of joint ventures that did not take place.

Let me also offer a couple of thoughts on small business applications, and I am inclined to use the word "incentive," and that is probably an improper definitive term, but I hope it is comforting to you. The Small Business Administration in the past has regarded this as very positive and has some very positive statements out on the bill.

Mr. WATT. That is very comforting.

Mr. PICKITT. I would also observe two factual elements for you. Today in order to build a modern production facility for semiconductors, you are looking at something approaching a billion dollars. Even most large corporations cannot afford to take the risk of that kind of capital investment, and particularly at the cost of capital in the United States, and the risk of somebody being able to

provide a level of competition by a new breakthrough or innovation that would put them out of business. They can't afford that kind of loss. So there is the further complication.

Looking in just the computer industry, since the early 1980's, the cycle development time in research and development for a PC computer has dropped from about 5 years to approaching 6 months. That kind of turnover rate in technology and the need to get it to market is beyond the capability of most corporations when you start from scratch for a small- or medium-sized business. The risks associated with that kind of generation of capital are beyond them as an individual. So they are forced to worry about, one, treble damages if they do something wrong; two, the risks that are involved that could threaten their very existence. There is a need for small companies to be able to come together and achieve and enjoy the economies of scale that the really large corporations have. And the bill that you are considering will provide that kind of foundation, that kind of stability, and that kind of opportunity to come together, build a modern facility, go into production, and still be able to maintain their independence, rather than have to license or merge or be acquired in turn.

Mr. COSTON. Mr. Watt, if I could just add one point? One of the benefits of the bill for small businesses to the extent they view themselves as possible victims of big firm oligarchic behavior, there is a disclosure provision that big firms that want all the benefits of the bill have to disclose the joint venture. It is published in the Federal Register. And any small business that says I am likely to be a victim of this bad behavior knows before the joint venture is underway and can go to the Justice Department or the Federal Trade Commission and ask for help on that. So there is a real positive benefit to the extent that small business perceives a possible victimization.

On the other hand, to the extent that small business is itself sometimes a defendant in antitrust suits, there is an assurance here that small businesses that want to get together and start a production joint venture can get some comfort early on, and whether possible plaintiff or possible defendant, the significant part of this bill is that it helps antitrust counselors advise small and large businesses alike on what the antitrust outcome is.

Mr. RILL. I have very little to add to both of those quite excellent answers, particularly Mr. Pickitt's description of practical experiences. I would simply want to stress that the legislation does not endorse monopoly, does not endorse the abuse of market power.

The bill would still leave full play for rule of reason analysis under which the Department of Justice or the private plaintiff could show that the joint venture was either a sham, or that unduly created a market power or that there was abuse of market power, either in the market where the venture operates or in some adjacent market.

So the legislation still contains full opportunity for the antitrust laws to protect consumers as well as small business.

Mr. KAPLAN. Congressman Watt, I would join in those comments, but I do think that to be realistic we ought to also state or restate the obvious, which is that once a notice has been filed, which may

contain a very broad statement of objectives, the detrebling of damages is automatic.

I do think that in general the bill strikes an appropriate balance, but I likewise believe that the bill should exclude those practices that the joint venture participants should not to engage in. I believe that it is appropriate that the chairman's bill does add a section stating that the participants cannot enter into any agreement, or engage in any other conduct, allocating a market. As I mentioned earlier, I believe that price fixing should be added to that provision.

Mr. WATT. Mr. Pickitt, I wonder if it would be possible for you or one of the witnesses to provide to the committee a little more detail on the two examples, specific examples you have given to us. And if I could get you to address the second part of the question, are there specific production joint ventures that are in the works that you think this bill will help to facilitate?

Mr. PICKITT. That is going to be very difficult for us to do since unless they have gone public, we won't have any information. They are handled very closely until they are made public by the companies. The trade associations just don't have that type of information provided to us, Mr. Watts.

I usually find that out shortly after the members of the committee do, in either USA Today, the Washington Post, or the Wall Street Journal.

Mr. WATT. Projecting a little bit based on your experience, what would be the nature of some of those kinds of production joint ventures that you could conceive might be impacted by this bill?

Mr. PICKITT. The ones that would be most likely are where there are requirements for a large and modern manufacturing facility that requires a massive investment of funds and a need to be put in operation fairly quickly in order to have the benefit of taking a new innovation or invention to the marketplace.

As I mentioned on the development cycle for personal computers dropping from 5 years to almost 6 months. I have a chart I would be glad to provide you that Hewlett-Packard shared with me. When they looked back, they could see that in 1992, the market orders which were made for Hewlett-Packard products resulted in about 50 percent of their orders being for products that had been on the market 2 years or less. This trend extends for several years, and what it shows is that the half-life of a product, if you will, is less than 24 months.

[The chart referred to above follows:]

HP Product Orders
by Year Introduced
1991
1990
1989
1988
1987
1986
1985
1984
1984
1985
1986
1987
1988
1989
1990
1991

Mr. PICKITT. So you need to have a new product coming on line soon and it has to be different. It has to be more capable, result in higher productivity, and offered at a lower cost or you are not competitive in the international marketplace.

This all leads to enormous upgrades and changes in manufacturing facilities to stay competitive, in order to be able to produce the new markets. Companies need to be able to come together to spread the risks, spread the requirement to generate capital, and work together to build a component that each can incorporate into their own product being marketed.

It is going to take some analytical time, just as it did on the 1984 act on research and development, for industry to understand the implications of the bill and get counsel from the Justice Department and their own staffs before they feel comfortable and safe using this approach.

Mr. WATT. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much.

I want to thank all of our witnesses.

Did you have something else?

Mr. INGLIS. Mr. Chairman.

Mr. BROOKS. The gentleman is recognized.

Mr. INGLIS. Thank you, sir, I got so caught up with asking Mr. Choate the question, I couldn't see beyond anything else.

I did have a question about the antitrust treatment being no less favorable to the U.S. persons in other countries. Is the language specific enough or do you have any suggestions about how to tighten it up?

Mr. RILL. I am not the author of the language at all, but I think the language itself is perfectly adequate to the job of assuring that the laws of the foreign country, the antitrust laws of the foreign country don't discriminate against U.S. firms seeking to participate in joint ventures.

As with any language, there will be some court interpretation of this and other provisions, but I think this has the appropriate thrust of legislative coverage in generality that I think does the job, in my opinion.

Mr. INGLIS. Thank you.

Mr. BROOKS. Any further questions? I want to thank our distinguished witnesses for their useful and informative testimony and to say that I am glad the legislation before us has garnered broad bipartisan support and widespread approval in the business community.

The bill has been carefully crafted, line by line, to reach acceptable language in a host of areas. It is now time for action—and not endless debate—and I intend to proceed very quickly.

Cooperative production arrangements can and should be a spur to American technological competition in the global marketplace. I am hopeful that this legislation will soon be before the President for his signature. The subcommittee is adjourned.

[Whereupon, at 12:20 p.m., the subcommittee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Organization for International Investment

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March 17, 1993

The Honorable Jack Brooks
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: National Cooperative Production Amendments of 1993

Dear Chairman Brooks:

I am writing on behalf of the Organization for International Investment ("OFII") to express our opposition to Section 7(2) of H.R. 1313, the National Cooperative Production Amendments of 1993, which you introduced March 11, 1993. An identical bill was introduced the same day by Senators Leahy, Biden and Thurmond (S. 574). We understand the Economic and Commercial Law Subcommittee is holding a hearing on H.R. 1313 tomorrow. We respectfully request that this letter be included in the hearing record.

OFII consists of more than 50 U.S. companies representing a broad cross section of the manufacturing and service sectors. The parent companies of OFII members are headquartered in countries throughout the world, including the United States' most important trading partners. Our members include some of the largest foreign investors in the United States, employing thousands of workers across the country. Many of our members' U.S. assets or revenues, or both, exceed billions of dollars. OFII's primary aim is to support and defend longstanding U.S. policies that favor an open international investment system.

OFII strongly supports the purpose of H.R. 1313 -- to promote U.S. competitiveness by encouraging joint production ventures. Section 7(2), however, violates the principle of national treatment because it conditions a company's treatment under U.S. antitrust laws on the nationality of its parent company's country of incorporation. This condition discriminates against foreign investment and could deprive the U.S. economy of many of the joint production law's intended benefits.

National Treatment

In order to establish a joint production venture, Section 7(2) requires that each person who "controls" any party to such venture must be a United States person or "a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production." This provision discriminates between companies on the basis of their share ownership. It conditions eligibility on who controls a joint venture party and whether the controlling person's country affords similar joint production opportunities to U.S. persons.

Discriminating between U.S. companies on the basis of their share ownership violates national treatment, a principle firmly embedded in international obligations of the United States. In the 1976 Declaration on International Investment and Multinational Enterprises, OECD member countries committed themselves to treat foreign controlled enterprises under their laws, regulations and administrative practices no less favorably in like situations than domestic enterprises. National treatment is required under the U.S.-Canada Free Trade Agreement and in Friendship, Commerce and Navigation Treaties between the United States and its major trading partners, as well as bilateral investment treaties the United States has negotiated with other countries throughout the world. Having championed national treatment in these treaties for decades, including most recently the far reaching investment chapter of North American Free Trade Agreement, it would send a powerful signal to foreign investors if the United States now casts the policy aside in favor of a different one.

The policy underlying Section 7(2) is reciprocity, or what might be termed in this case "reciprocal national treatment." Under this policy, established foreign-owned U.S. enterprises are given equal protection under U.S. law only if the foreign countries in which their parents are based treat U.S. companies equally under their laws. This policy is counterproductive and potentially dangerous. The purpose of reciprocity is usually to open foreign markets to U.S. investment. Whether the policy will in fact accomplish this purpose in any particular case is a matter of serious doubt. If it does not, however, it will succeed in leveling the playing field, but at the lowest and most restrictive level for all -- both foreign-owned U.S. companies and U.S.-owned companies abroad. The United States should not deprive itself of highly productive economic activity -- employment of thousands of workers, research and development, and investment in plant and equipment -- because

of disagreements with other countries' investment laws. These disagreements, if in fact there are any, can be dealt with in the context of U.S. treaty obligations which secure rights for U.S. investors in other countries in addition to protecting the rights of foreign investors in the United States.

National treatment is the foundation of a stable and prosperous international investment system. Treating companies differently solely because of their share ownership discourages the efficient movement of capital and inhibits the most productive allocation of resources. National treatment promotes job creation, economic development and technological advancement.

Competitiveness

Imposing reciprocity conditions on investments of U.S. foreign-owned companies will hurt American competitiveness. Foreign direct investment makes important contributions to the United States. U.S. subsidiaries of foreign based parents now employ more than 11% of the U.S. manufacturing workforce and approximately 5% of total U.S. employment. Data indicate that these are high-wage, high-skill jobs. Foreign-owned firms on average paid their workers 22% more in 1990 than did all U.S. business. U.S. foreign-owned firms invested on average more heavily in research and development than did all U.S. business, with productivity rising nearly four times faster than U.S. owned companies according to the most recently available data.

The continued flow of investment to the United States, however, should not be taken for granted. Despite rapidly rising foreign investment to a peak of $69 billion in 1989, the growth of new foreign investment declined to $46.1 billion in 1990 and $12.6 billion in 1991. Data released yesterday by the Commerce Department show that, in 1992, the level of new foreign direct investment fell even more sharply to a negative figure of $3.9 billion. Discriminating against foreign-owned companies in violation of national treatment will deter foreign investment and cause it to decline even more.

Today the market in which investment decisions are made is global. With slow or negative growth in many parts of the world, new investment capital is scarce. Limiting the antitrust liability joint production ventures may face in the United States should encourage their creation, attracting investment to areas where companies may have been deterred in the past. To foreign investors, however, the clear message of Section 7(2) is that their enterprises in the United States

will not be treated on the same terms as other U.S. companies. Unlike other U.S. companies, they will have to prove their eligibility against a vague standard of "control" (under some criteria share ownership of as little as 5% or 10% could constitute effective control), and they will have to show that U.S. companies are treated similarly under another country's antitrust laws (on their face or, even more difficult to establish, as enforced). They may simply choose to locate their production facilities elsewhere.

The joint production law is intended to strengthen American competitiveness and encourage technological innovation. From the standpoint of competitiveness, the desirable effects of joint production do not depend on the ownership of the companies engaging in it. The law's benefits should be made available to all companies with substantial business activities in the United States. Section 7(2) will discourage companies from entering joint production ventures with U.S. foreign-owned firms, limiting employment opportunities for American workers and depriving the U.S. economy of the capital, technology and innovation that U.S. foreign-owned firms could provide. Ironically, too, if Section 7(2) does prompt other countries to limit their antitrust liability for joint production ventures, Section 7(2) may actually encourage investment in production facilities elsewhere, employing workers at new facilities in those countries rather than in the United States.

OFII's member companies may in fact be eligible to participate in joint production ventures because their parent companies are incorporated in countries that afford reciprocal opportunities to U.S. owned companies, but this does not detract from the principle at stake in this legislation -- equal treatment of all U.S. companies under U.S. law. Foreign-owned companies in the United States have relied on the principle of national treatment. If reciprocity is the policy in this legislation, it may be used in other legislation as well, calling into question the security of all foreign investment. Many foreign-owned companies have been operating in the United States for decades. They employ thousands of Americans at facilities across the United States. They provide the same benefits to the U.S. economy as U.S. owned companies. They are entitled to the same treatment under U.S. law as other U.S. companies.

Alternate Language

OFII would welcome the opportunity to work with you and your staff to fashion acceptable language that would be consistent with the principle of national treatment and would further the

pro-competitive purposes of the bill. One way would be simply to delete the phrase "person who controls any" and the parenthetical "(including such party itself)", so that Section 7(2) would read:

> "each party to such venture is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to a United States person than to such country's domestic persons with respect to participation in joint ventures for production."

This language would be consistent with national treatment if "United States person" were defined as a person that is organized under the laws of a State or of the United States and that has its principal place of business in the United States or an individual citizen of the United States. "Foreign person" would be defined as a foreign state, a person that is organized under the laws of such foreign state or that has its principal place of business outside the United States or an individual who is not a citizen of the United States.

It should be clear that the U.S. subsidiary of a foreign corporation would be a United States person because it is incorporated in the United States, regardless of the nationality of the ownership of its parent corporation. At the same time, it would not violate national treatment if a foreign person (as defined) were prohibited from taking advantage of the joint production law's limited antitrust immunity unless U.S. persons (as defined) were afforded similar benefits under the foreign person's antitrust laws. This reciprocity condition, however, would not apply to U.S. companies that are owned by foreign parents. These U.S. companies provide the benefits to the U.S. economy the law is intended to promote.

Sincerely,

Robert Umphrey

Robert Umphrey
Chairman
Investment Committee

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